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IN THE

Supreme Court of the United States

October Term 1975

No. 75-526

LOCAL 1104, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and WELLINGTON G. RIGBY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Local 1104, Communications Workers of America, AFL-CIO ("Local 1104") prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit issued in this case on July 21, 1975 insofar as that decision denied its petition to review, and granted the cross-application of the National Labor Relations Board (the "Board") to enforce that portion of the Board's order herein dated June 6, 1974 that relates to Local 1104.[1]

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[1] The consolidated proceeding before the Board was based on two charges, one filed against Local 1104, the Petitioner in this

Opinions Below

The opinion of the Court of Appeals (App. A. *infra*, pp. 1a-19a) is reported in 89 LRRM 3028, but, as of the date of this Petition, has not been officially reported. The Judgment of the Court of Appeals was filed on August 22, 1975. (App. B. *infra*, pp. 20a-21a.) The Decision and Proposed Order of the Administrative Law Judge and the Decision and Order of the National Labor Relations Board affirming his decision and adopting his recommended order (App. C. *infra*, pp. 22a-49a) are reported at 211 NLRB No. 18.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

An employee in a unit covered by a collective bargaining agreement sought to replace the incumbent union with a rival union. Thereafter, when his application for membership in the incumbent union was denied because of his disloyal conduct, he refused to pay his dues under the "agency shop" provision in the collective bargaining agreement, and the union requested the employer to discharge

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Court, and the other filed against Local 1101, Communications Workers of America, AFL-CIO. The Board issued a cease and desist order which contained separate decretal provisions against each local union. The Court of Appeals denied the petition of the two unions to review the Board's order and granted the Board's cross-application to enforce it. Local 1101 is not, however, petitioning this Court to review the decision of the Court of Appeals. Accordingly, the only portions of the record and of the opinion of the Court of Appeals that are material and relevant upon this Petition are those that relate to the charge against Local 1104.

him on this ground. The employee filed a charge against the union under the National Labor Relations Act (the "Act"). The General Counsel of the Board refused to issue a complaint against his exclusion from the union, on the ground that such exclusion was privileged under Section 8(b)(1)(A) of the Act. The question presented is whether the union, having lawfully excluded the employee from membership, is precluded by Section 8(b)(1)(A) or (2) of the Act from requiring him to pay his agency shop dues which represent his share of the cost of union representation.

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§151 et seq. are the following:

National Labor Relations Act §7, 28 U.S.C. §157

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

National Labor Relations Act §8(a)(3), 29 U.S.C. §158(a)(3)

Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

• • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for

believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

National Labor Relations Act §8(b)(1) and (2), 29 U.S.C. 158(b)(1) and (2)

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; • • •

Statement

A. The Facts[2]

There is no dispute as to the facts (A72).

The Petitioner, Local 1104, is a constituent Local Union of Communications Workers of America, AFL-CIO ("CWA") (A10, A72). CWA is the certified collective bargaining representative of certain employees of New York Telephone Company ("Telco") (A10, A72). CWA and Telco are parties to a collective bargaining agreement (the "Collective Agreement") covering said employees (A6, A10, A11, A73-A74). Local 1104, along with other constituent locals of CWA, participates with CWA in the administration of the Collective Agreement (A11).

The Collective Agreement contains an "agency shop" clause which reads, insofar as relevant here, as follows (A6, A32):

> "Each regular employee shall, as a condition of employment, pay or tender to the Union amounts equal to the periodic dues applicable to members for the period beginning 30 days after hire or 30 days after February 17, 1972, whichever occurs later, until the termination of this collective bargaining agreement . . ."

In the spring of 1972, one Wellington G. Rigby, an employee of Telco in the unit represented by CWA, who had been a member of Local 1104 but had resigned in July 1971, engaged in organizing activities seeking to displace Local 1104 with the Teamsters Union (A10, A13-

[2] Page references such as "A20 and A31" are to pages in the Joint Appendix in the Court of Appeals which Petitioner has requested that Court to certify to this Court.

A14, A82). These efforts proved unsuccessful, and in July 1972 Rigby applied for membership in Local 1104 (A6, A82). Local 1104 rejected his application for membership on the ground of his disloyalty or "dual unionism" in attempting to replace Local 1104 with the Teamsters (A10, A13-A14, A82). When Rigby refused to pay his agency fees, Local 1104 requested Telco to terminate his employment because of such failure. Whereupon Rigby filed with the Board the charge against Local 1104 that initiated this proceeding (A82-A83, A3).

B. The Proceedings Before the Board and Its Decision

The charge alleged that Local 1104's refusal to admit Rigby "restrained and coerced employees in the exercise of the rights guaranteed by Section 7 of the Act" (A3). When the Regional Director of the Board refused to issue a complaint, Rigby appealed to the General Counsel. The General Counsel sustained the Regional Director's refusal to issue a complaint against Local 1104 for its refusal to admit Rigby into membership, saying (A13-A14):

> "The investigation did not establish that the union unlawfully refused to accept Rigby into membership. Rather the evidence established that the union refused to accept him into membership because he had engaged in dual unionism by attempting to replace the incumbent union with Teamsters, which refusal was privileged under Section 8(b)(1)(A) of the Act."

The General Counsel concluded, however, that a complaint should issue on the allegation that Local 1104's request to Telco to terminate Rigby's employment for nonpayment of dues violated Section 8(b)(1)(A) and (2) of the Act (A14).

The Administrative Law Judge ("ALJ") found that Local 1104 violated Sections 8(b)(1)(A) and (2) of the Act by requesting Telco to discharge Rigby for his refusal to pay dues after he had been denied membership in the union for engaging in organizational activities on behalf of a rival union (A83, A87). He recommended an order directing Local 1104 to cease and desist from requesting the discharge of employees for non-payment of dues while denying them membership because of their activities on behalf of another union (A90).

As authority for his decision, the ALJ relied on two earlier Board decisions, *Local 4186, United Steelworkers of America, AFL-CIO (McGraw Edison Co.)*, 181 NLRB 992 (1970) and *Communications Workers of America, Local 9509, AFL-CIO (The Pacific Telephone and Telegraph Company)*, 193 NLRB 83 (1971). In *McGraw Edison*, an employee who had filed a decertification petition with the Board was denied the right to attend union meetings and to hold union office for one year; he thereupon refused to pay his dues, and the union demanded his discharge pursuant to a union shop clause. The Board held that the union thereby violated Section 8(b)(1)(A) since its insistence on payment of dues at a time when the employee's membership rights were impaired "constituted a continuing form of coercion tending to operate as a serious restraint upon access to Board processes." (181 NLRB 992) In *Pacific Telephone*, employees soliciting signatures in support of a decertification petition were expelled from the union; they ceased paying dues and the union demanded their discharge under the union security clause in the contract. Relying on *McGraw Edison*, the Board held that the union violated Section 8(b)(1)(A) and (2).

The ALJ decided to extend the holdings in *McGraw Edison* and *Pacific Telephone* to the facts of the present

case in which the employee who was deprived of membership rights in the union had not sought to invoke Board decertification procedures but had engaged in organizational activities on behalf of a rival union, which the ALJ found to be a right protected by Section 7 of the Act (A79-A80, A83).

The Board affirmed the rulings, findings and conclusions of the ALJ without opinion and adopted his recommended order (A96-A97).

C. The Decision of the Court of Appeals

The Court below denied Local 1104's petition to review the Board's order and granted the Board's application for enforcement.

Its decision was predicated upon the following grounds:

First, that the language of Section 8(b)(2) to the effect that it is an unfair labor practice for a union ". . . to cause or attempt to cause an employer . . . to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender periodic dues . . ." literally construed prohibits Local 1104 from seeking Rigby's discharge for non-payment of dues after having denied him membership for another reason (App. A, *infra*, p. 16a);

Second, that Local 1104's acts violated Section 8(b)(1)(A) of the Act (App. A, *infra*, p. 16a);

Third, that under this Court's finding in *National Labor Relations Board* v. *General Motors*, 373 U.S. 734, at p. 744, that an agency shop ". . . places the option of membership in the employee . . .", Local 1104 having denied full membership to Rigby, may not then require him to pay dues (App. A, *infra*, pp. 16a-17a);

Fourth, that Local 1104's position is that the lawfulness of the employee's exclusion from the union is irrelevant in deciding whether the union may thereafter require him to pay dues, and that if this position were adopted, it would lead to the "incongruous result" of giving unions greater coercive power under an agency shop than under a union shop (App. A, *infra,* p. 17a); and

Fifth, that although the enforcement of the Board's order will enable Rigby to be a "free rider" and have the benefits of union representation without paying for them, the policy in favor of empowering unions to prevent disloyal employees from becoming "free riders" must be sacrificed in favor of what the Court found to be the more important policy against "compulsory unionism" (App. A, *infra,* pp. 18a-19a).

Reasons for Granting the Writ

It is well settled law that an employee may not be required under threat of discharge from his job to become or remain a member of the union *as long as he pays his union dues.* In an agency shop, which was held by this Court to be a lawful form of union security in *National Labor Relations Board* v. *General Motors Corporation,* 373 U.S. 734, the union security clause by its terms requires only that the employee pay his dues and does not require him to acquire or maintain union membership. Even under a union shop clause, which by its terms requires an employee to become and remain a member of the union, it is now well-settled that as long as the employee pays his dues he cannot be required by threat of discharge from his job to be a union member. Thus, a unit employee who tenders his dues to the union may not be discharged under a union shop clause if he is excluded from union membership for

failure to comply with union-imposed conditions of membership. *Union Starch & Refining Co.* v. *National Labor Relations Board,* 186 F. 2d 1008 (7th Cir.). Nor may an employee who is willing to pay his union dues be discharged under a union shop clause if he resigns his membership in the union in order to avoid being subject to union-imposed disciplinary measures enforceable in state courts. *National Labor Relations Board* v. *Hershey Foods Corp.,* 513 F.2d 1083, 89 LRRM 2126 (9th Cir.).

The case at bar presents an example of the converse question, namely: Whether a union employee, who has been denied union membership for failure to comply with a lawful union-imposed condition of membership (in this case, loyalty to the union), so that the union is privileged to exclude him from membership under the proviso to Section 8(b)(1)(A) of the Act, may nevertheless be required under the union security clause to pay dues or lose his job, or whether his lawful exclusion from the union precludes the union from requiring him to pay dues and thereby excuses him from paying his share of the cost of the representation that the union is required by law to afford fairly and without discrimination to all employees whom it represents. See *Vaca* v. *Sipes,* 386 U.S. 171, 177.

The question is an important one. As the Court below recognized, its decision that the lawful denial of membership to Rigby precludes Local 1104 from requiring him to pay dues will establish a rule permitting him and other similarly situated employees to become "free riders" and will thereby significantly weaken the national labor policy against permitting employees represented by unions to avoid paying their share of the cost of such representation. See App. A, *infra,* pp. 18a-19a; *Radio Officers Union* v. *NLRB,* 347 U.S. 17, 41; *General Motors, supra,* 373 U.S. 741-743.

This Court has never decided the question. In *General Motors* it expressly left the question open and at the same time indicated its importance, saying that "... the significance of desired, but unavailable, membership ... we leave for another case." *General Motors, supra,* 373 U.S. at p. 744, ftn. 12.

The case at bar squarely presents the question left open in *General Motors.* Certiorari should be granted because, as is shown below, the Court of Appeals, in deciding the question against the union, misconstrued and misunderstood the pertinent provisions of the Act, the decision of this Court in *General Motors,* the position of Local 1104 with respect to the law, and the national labor policy as expressed in the Act, its legislative history and the decisions of this Court.

1. The Court of Appeals misconstrued Section 8(b)(2) when it held that the Section prohibits Local 1104 from demanding Rigby's discharge for his refusal to pay dues after having excluded him from membership on a different, and lawful, ground.

It is true that the language of Section 8(b)(2), when construed with rigid literalness, appears to support the position of the Court below. But as this Court has pointed out:

> "It is well settled that in construing the Act, even where its terms appear clear on their face, ... recourse to legislative history to determine the sense in which Congress used the words is not foreclosed. We have only this Term again admonished that labor legislation is peculiarly the product of legislative compromise of strongly held views [citing case] and that legislative history may not be disregarded merely because it is arguable that a provision may unambiguously embrace conduct called in question [citing case]." *NLRB v. Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 179-180.

The legislative history of Sections 8(a)(3) and 8(b)(2), which contain the provisions enacted in 1947, as part of the Labor-Management Relations Act of 1947, to set the boundaries of permissible union security arrangements between employers and unions, shows that Congress did not intend to preclude a union from requiring an employee who has been excluded from membership to pay dues under a union security clause.[3]

When it enacted Sections 8(a)(3) and 8(b)(2), Congress was seeking to eliminate certain specific practices, which it found to be evil and abusive, that had arisen under union security arrangements where the jobs of employees were conditioned upon their membership in the union. These practices included the denial of jobs to persons who were not already union members, the control of hiring by unions rather than by management, and the discharge from jobs of employees who were expelled from unions, often for capricious reasons.[4]

Congress recognized, however, that if it prohibited all union security provisions "... many employees sharing

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[3] Although the legislative history of the Sections does not indicate that Congress intended to limit the right of a union to require dues payments from an excluded employee to situations where the exclusion is privileged under the proviso in Section 8(b)(1)(A) and is, accordingly, lawful, Local 1104 concedes, and has conceded throughout the course of this case, that where the exclusion is unlawful, the excluded employee may not be compelled to pay dues. See p. 20, *infra.* The prohibition against the collection of dues in such a case would be in the nature of a sanction imposed against the union on account of its unlawful conduct.

[4] See excerpts from S. Rept. No. 105 on S.1126, 80th Cong., 1st Sess. pp. 5-7, 20-22, 1 Legislative History of the Labor-Management Relations Act of 1947 ("Leg. Hist."), pp. 411-413, 426-428, set forth in Appendix D, *infra,* pp. 52a-53a.

the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost." [5] Accordingly, although it prohibited the discharge of employees under a union security clause for any other reason, it expressly permitted such discharge for failure to pay dues. In the words of the Senate Committee on Labor and Public Welfare, ". . . expulsion from a union cannot be a ground of compulsory discharge *if the worker is not delinquent in paying his initiation fees or dues . . .*" [6] And in speaking specifically of Section 8(b)(2) the Committee said:

> "It is to be observed that unions are free to adopt whatever membership provisions they desire, but they may not rely upon action taken pursuant to those provisions in effecting the discharge of, or other job discrimination against, an employee except in the two situations described. Thus an employee, even though he loses his union membership for reasons other than those set forth, may not be deprived of a job because of a contract requiring membership as a condition of employment. *Discrimination is permitted only if he has failed to tender dues and initiation fees or* has engaged 'dual union' activity . . . at an inappropriate time . . ." (Italics supplied)[7]

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[5] S. Rept. No. 105, 80th Cong., 1st Sess., p. 6, 1 Leg. Hist. 412, set forth at Appendix D, *infra,* p. 51a.

[6] Op. cit. at p. 7, 1 Leg. Hist. 413, set forth in App. D, *infra,* p. 53a.

[7] S. Rept. No. 105, 80th Cong., 1st Sess., p. 21, 1 Leg. Hist. 427, set forth at App. D, *infra,* at p. 53a. It should be noted that the Senate Bill originally permitted the imposition of job-related sanctions for activity to oust an incumbent union except at a time when the Board would entertain a representation petition. This provision was eliminated from the Act as it was passed. However, the fact that job-related sanctions may not be imposed upon an employee for "dual unionism" does not preclude the incumbent union from excluding him for disloyalty.

Similarly, Senator Taft, one of the principal sponsors of the Act, declared (93 Cong. Rec. 3953, Leg. Hist. 1010):

> "The bill further provides that if the man is admitted to the union, and subsequently is fired from the union for any reason other than nonpayment of dues, then the employer shall not be required to fire that man. In other words, what we do, in effect, is to say that *no one can get a free ride in such a shop. That meets one of the arguments for the union shop. The employee has to pay the union dues.* But on the other hand, if the union discriminates against him and fires him from the union, the employer shall not be required to fire him from the job. During the testimony we heard of a case in which a union member saw a shop steward hit a foreman. That union member was called to testify in court, and he testified that he saw the shop steward hit the foreman. Subsequently, the union called him before their board for discipline, and said that for him to testify as he did was unfair to the union, although he had been subpenaed to testify in court and sworn. Thereupon he was fired from the union, and under the union agreement the employer would have to fire him. Under this bill the employer would not have to fire that man *unless he did not pay his union dues.*" (Italics supplied)

Similarly, Senator Ellender, one of the supporters of the Act, declared (93 Cong. Rec. 4262, Leg. Hist. 1068):

> "In order to protect the employees a union cannot cause the discharge of any of its members simply because it wants to blackball them such as in the De Mille case or the McGrath case. *The union may still expel a man but so far as the employer is concerned he does not have to fire that man so long as that employee pays*

his dues to the union. I think this provision is bound to prevent such abuses as I discussed a while ago." (italics supplied)

The foregoing legislative history establishes two things:

First, that in enacting Sections 8(a)(3) and 8(b)(2), Congress was not concerned with protecting the rights of employees to enjoy union membership, but rather with protecting employees against loss of jobs and other job-related sanctions;

Second, that although Congress intended to prohibit the imposition of job-related sanctions for any other reason, it plainly intended to allow the imposition of such sanctions for nonpayment of dues even where union membership has been denied.

Under the construction of Section 8(b)(2) on which the Court of Appeals predicated its decision, a union which lawfully excludes an employee from membership is thereafter precluded from invoking job-related sanctions to compel him to pay dues. So construed, Section 8(b)(2) endows employees with an unqualified right to full union membership—a right which the union may not infringe without losing its power under the union security clause to require employees to pay their way. This is far beyond the scope of what Congress intended when it enacted the Section.

2. The Court of Appeals erred in holding that Local 1104 violated Section 8(b)(1)(A) of the Act.

That Section provides that it is an unfair labor practice for a labor organization to ". . . restrain or coerce employees in the exercise of the rights guaranteed in section 7: *Provided*, that this paragraph shall not impair the

right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . ." Section 7, insofar as pertinent, provides that "[e]mployees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and shall also have the right to refrain from . . . such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

The Court below found that Local 1104 had violated section 8(b)(1)(A) in seeking to compel Rigby to pay dues under the agency shop clause because it had excluded him from membership for engaging in a "protected activity" under the foregoing sections.

Sections 7 and 8(b)(1)(A) do not, however, "protect" Rigby from being excluded by Local 1104 for his dual union activities. As we have seen, the General Counsel of the Board held that Local 1104's action in excluding Rigby from membership was privileged under the proviso to Section 8(b)(1)(A) quoted above. His decision was in accordance with well settled law that organizational activities on behalf of a rival union are not protected against union disciplinary action such as expulsion or exclusion.[8]

As Local 1104 was privileged to exclude Rigby under the 8(b)(1)(A) proviso, the invocation of job-related sanctions *to compel him to pay his dues* cannot be held to interfere with any "protected" activity.[9]

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[8] See *Price* v. *NLRB*, 373 F. 2d 443 (9th Cir.), cert. den. 392 U.S. 904; *NLRB* v. *International Moulders & Allied Workers Union*, 442 F. 2d 92, 94 (7th Cir.).

[9] *NLRB* v. *Bell Aircraft Corp.*, 206 F. 2d 235 (2nd Cir.), cited by the Court below, is not in point because in that case job-related

It should be noted here that compelling Rigby to pay his dues cannot be said to have any coercive effect that would discourage him from engaging in the organizational activities for which Local 1104 excluded him. For he would have had to pay dues had he been admitted, will have to pay dues if he one day is admitted and would have had to pay dues to the Teamsters had his efforts on their behalf been successful.

No doubt, if Rigby is excused from paying his dues by virtue of his exclusion, he and other disgruntled employees may be *encouraged* to avoid having to pay dues by committing acts which make it intolerable for their unions to continue them as members. But the fact that employees may be affirmatively encouraged to commit disloyal acts if they can thereby avoid having to pay dues does not mean that requiring them to pay dues, which they would otherwise have had to pay in any event, has the negative effect of discouraging them from committing such acts.

3. Another ground on which the Court of Appeals based its decision was its finding that Local 1104's position, namely, that having lawfully excluded Rigby from membership, it retains the right to require him to pay dues under the agency shop clause, is inconsistent with the decision of this Court in *General Motors*. The Court below had in mind this Court's statement in that case that a collective bargaining agreement containing an agency shop clause ". . . places the option of membership in the em-

sanctions were invoked not to compel the payment of dues but to punish a member against whom charges had been brought within the union for having returned to work before the end of a strike. In the case at bar, it is undisputed that Local 1104 seeks Rigby's discharge *only to compel him to pay his dues* and that, if he would pay his dues, Local 1104 would not invoke job-related sanctions against him.

ployee . . ." *General Motors*, 373 U.S. at p. 744. According to the Court below, Local 1104 deprived Rigby of this "option of membership" by excluding him from its ranks. See App. A., *infra*, p. 16a.

The Court below misunderstood what this Court meant when it stated that an agency shop "places the option of membership in the employee." In making that statement, this Court was comparing a union shop, under the express terms of which a union may, theoretically, at least, compel employees to be members with an agency shop, under which employees have no obligation to be members but have only the obligation to pay dues.[10] *General Motors* 373 U.S. at pp. 743-744. Thus the "option of membership" referred to by this Court in *General Motors* is simply the right or option of an employee *not to be a member if he does not wish to*. In speaking of an employee's "option of membership", this Court did not decide or even suggest that an employee has a right or option to be a member *if the union has a lawful basis for excluding him*. Whether an employee has the latter option is the very question that this Court expressly left open in *General Motors* (373 U.S. 744, ftn. 12; see p. 12, *supra*) and is the question presented by this case.

4. The Court of Appeals also predicated its decision on its finding that Local 1104 takes the position that under an agency shop, which is the form of union security in the case at bar, the reasons for denial of full membership are irrelevant in determining whether the union's subsequent demands for dues payments constitute a violation of Section 8(b)(2). This, the Court reasoned, leads to the "incongruous result" of giving unions "a greater degree of co-

[10] Under the law as it now stands, the power of a union under a union shop to compel employees to be members is theoretical only. See *Hershey Foods Corp.*, mentioned at p. 11, *supra*.

ercive power" in the case of agency shops, which are generally viewed as a weaker form of union security, than they have in the case of union shops, which are generally viewed as the stronger form of union security. App. A. *infra,* p. 17a.

The Court below completely misunderstood Local 1104's position. Local 1104's position is that the reasons for denial of full membership are highly relevant. Its view is that *because the denial of membership to Rigby was lawful,* its demand that he pay dues under the agency shop clause did not violate Section 8(b)(2). It concedes that if the denial of membership to Rigby had constituted an unfair labor practice under the Act, then the demand that he pay dues would have been a violation of that Section.

Local 1104's position is that a union's right to exclude an employee from membership and thereafter to demand dues payments under a union security clause depends upon the same factors whether that clause provides for an agency shop or a union shop. Indeed, as has been pointed out at pp. 11, 12, *supra,* as far as the rights and obligations of employees with respect to union membership and dues payments are concerned, there is no difference of substance today between a union shop and an agency shop. *General Motors,* 373 U.S. at pp. 743-744; *Union Starch, supra; Hershey Foods Corp., supra.*

5. Finally, the Court of Appeals based its decision on its judgment that the national labor policy of requiring every employee represented by a union to pay his share of the cost of such representation must be sacrificed in favor of what the Court conceived to be the national labor policy against "compulsory unionism".

In making this judgment, the Court conceded that its "... decision necessarily entails some inroads on a union's

ability to protect itself from free riders ..." and that "[t]he union was within its rights in denying [Rigby's] membership application, and after our decision here it will either have to take him or forego his financial support ..." App. A, infra, at pp. 18a, 19a. It concluded, however, that the national policy against compulsory unionism outweighed the policy against free riders.

The weakness in the reasoning of the Court below is that to require Rigby to pay his dues would not in any way violate or impinge upon the national labor policy against compulsory unionism.

For, as we have seen, what Congress meant by "compulsory unionism" and what it sought to eliminate by the enactment of Sections 8(a)(3) and 8(b)(2) was the evil of making an employee's employment conditional upon his actual membership in the union, which, in turn, had led to the "closed shop-closed union" and the various other abusive practices referred to at p. 13, *supra.* But, as appears from the legislative history, Congress did not believe that making an employee's employment conditional upon his paying his share of the cost of union representation (i.e., his dues) constituted an evil of "compulsory unionism" that ought to be prohibited; on the contrary, it clearly and expressly excepted the imposition of job-related sanctions to require dues payments from the general ban against making employment conditional upon union membership.

Accordingly, the policy against compulsory unionism is not involved in this case. Therefore, the Court of Appeals was mistaken when it invoked what it conceived to be that policy as its reason for concededly impairing the national labor policy against free riders.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully yours,

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APPENDIX

APPENDIX A

Opinion of United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 446, 1034—September Term, 1974.

(Argued June 5, 1975 Decided July 21, 1975.)

Docket Nos. 74-2044, 74-2230

LOCAL 1104, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, and LOCAL 1101, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

NEW YORK TELEPHONE COMPANY and WELLINGTON G. RIGBY,

Intervenors.

Before:

SMITH, ANDERSON and OAKES,

Circuit Judges.

Petition for review by two union locals, and cross-application for enforcement by National Labor Relations Board, of Board order directing locals to cease and desist from

committing unfair labor practices and to take affirmative action to remedy unfair labor practises. The Board held that the locals committed unfair labor practices (a) denying union membership to employees who, while nonmembers, refused to participate in an illegal strike; (b) by attempting to invoke an agency shop clause in order to obtain the discharges of those employees when they refused to tender union dues after their applications for membership were denied; and (c) by invoking the same agency shop clause in order to obtain the discharge of an employee who refused to tender union dues after his application for membership was denied because of his organizational activities on behalf of a rival union. National Labor Relations Act §§8(b)(1)(A), 8(b)(2), 29 U.S.C. §§158(b)(1)(A), 158(b)(2). 211 NLRB No. 18 (1974).

Petition for review denied; cross-application for enforcement granted.

H. Howard Ostrin, New York, N.Y. (Cohn, Glickstein, Lurie, Ostrin & Lubell, New York, N.Y.) and Kane & Koons, Washington, D.C., of counsel, *for Petitioners.*

Frederick D. Braid, Mineola, N.Y. (Rains, Pogrebin & Scher, Mineola, N.Y., Bertrand B. Pogrebin, of counsel), *for Intervenor Rigby.*

Bernard Yaker, New York, N.Y., George E. Ashley and William P. Witman, New York, N.Y., of counsel, *for Intervenor New York Telephone Co.*

Robert A. Giannasi, Asst. General Counsel, National Labor Relations Board, Washington, D.C. (Peter G. Nash, General Counsel, John S. Irving, Deputy General Counsel, Patrick Hardin, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel and Frank C. Morris, Jr., Attorney, National Labor Relations Board, of counsel), *for Respondent.*

Smith, *Circuit Judge*:

This case presents a novel problem of accommodating a union's legitimate interests of self-preservation with employees' valid but conflicting claims to freedom from compulsory unionism. While our attempt to strike the proper balance must be guided by the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, the case does not fall neatly under any of its specific provisions. The ensuing necessity to extrapolate from the statutory language, which itself frequently borders on the impenetrable, imparts considerable difficulty to the task of deciding the questions here presented. We are convinced, however—as convinced as a court can be when asked to decide what the Congress would have done had it confronted a problem that did not occur to it—that the National Labor Relations Board (hereafter the NLRB or the Board) was correct in its determination that the petitioning union locals committed unfair labor practices when they attempted to enforce an agency shop clause against employees who had been denied full union membership for reasons other than their failure to tender union dues. Accordingly, we deny the locals' petition for review and grant the Board's cross-application for enforcement.

Appendix A

I. The Facts

Although this case is here on a single petition for review of a single order of the Board, it in fact involves two separate cases, both concerning local unions of the Communications Workers of America, AFL-CIO (CWA), and employees of the New York Telephone Company (Telco).

A. *The Local 1101 (Telco) Case.*

Local 1101 of the CWA represents Telco employees in Manhattan and the Bronx.[1] It participated in the CWA's nation-wide telephone strike in July, 1971. Although an agreement between the CWA and the Bell System was reached to end the strike nationally on July 21, the New York locals rejected the proposed settlement and stayed out until approximately February 18, 1972.[2] The new contract with Telco which was ratified at that time contained the following "agency shop" provision:

ARTICLE 33

Agency Shop

33.01. Each regular employee shall, as a condition of employment, pay or tender to the Union amounts

[1] The Administrative Law Judge's opinion states that Local 1101 has jurisdiction over Suffolk County, whereas Telco's brief places it in Manhattan and the Bronx. Since the charge filed with the Board by Telco locates the plant in question at 140 West Street, New York City, it would appear that the Administrative Law Judge was mistaken. The error, however, is inconsequential.

[2] This strike has been held illegal for failure to comply with the notice provisions of the Act, §8(d), 29 U.S.C. §158(d), *Communications Workers of America, AFL-CIO (New York Telephone Co.)*, 208 NLRB No. 32 (1974), and that determination is not contested in this proceeding.

Appendix A

equal to the periodic dues applicable to members for the period beginning 30 days after hire or 30 days after February 17, 1972, whichever occurs later, until the termination of this collective bargaining agreement, except that an employee may terminate this condition of employment by giving a written individual notice to the Company and the Union of such termination by certified or registered mail, return receipt requested, and postmarked between July 8, 1974 and July 17, 1974 both dates inclusive.

During the strike, numerous employees who either resigned their union membership or never were union members crossed the picket lines and went to work. In July, 1972—four months after the strike's end—at least twenty-nine of these employees ("the strikebreakers") applied for union membership and signed check-off cards authorizing the deduction of union dues from their pay. On or about August 18, 1972, Local 1101 denied their applications, solely because they had not participated in the strike. The employees then refused to tender amounts equivalent to union dues, whereupon the local, on or about December 4, 1972, demanded their discharge by Telco under the agency shop clause. Telco refused, and on February 2, 1973, it filed a charge of unfair labor practices against the union with the NLRB. The Regional Director issued a complaint, alleging that the local had violated §8(b)(1)(A) and §8(b)(2)[3] by denying union membership to the

[3] Section 8(b), 29 U.S.C. §158(b), provides in pertinent part:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Pro-*

strikebreakers and again by attempting to invoke the agency shop clause against them. The Administrative Law Judge held that the unfair labor practices were committed as charged, and his decision was adopted by the Board, 211 NLRB No. 18 (1974).

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vided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

. . .

The relevant portion of subsection (a)(3) referred to in §8(b)(2) makes it an unfair labor practice for an employer

by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . ; *Provided further,*

That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

• • •

B. *The Local 1104 (Rigby) Case.*

Wellington Rigby has been employed by Telco since 1948. He was a member of Local 1104—which has jurisdiction over Nassau County—but resigned just prior to the 1971 strike. Although he honored the CWA's picket lines, he engaged in organizational activities on behalf of the Teamsters, a rival union, soon after the strike's end. His efforts proved unsuccessful and in July, 1972, he applied for membership in Local 1104 and executed a dues check-off card. On September 5, 1972, the local denied his application because of his activities on behalf of the Teamsters. Rigby then refused to tender any more dues, and the local attempted to invoke the agency shop clause to obtain his discharge. Rigby filed a charge with the Board; the Regional Director refused to issue a complaint, but was reversed by the Board's General Counsel. The complaint that ultimately issued—unlike that in the Telco case—did not claim that the refusal to admit Rigby to membership in the local was an unfair labor practice, but rather was limited to the invocation of the agency shop clause in an attempt to cause his discharge. The Administrative Law Judge held that this was indeed an unfair labor practice, and his conclusion was adopted by the Board.

II. Denial of Strikebreakers' Membership Applications.

Under §8(b)(1)(A), a union may not restrain or coerce employees in the exercise of rights protected by §7, 29 U.S.C. §157. Clearly the strikebreakers were engaged in protected activity when they declined to participate in the strike. Local 1101 maintains that it was justified in denying them membership by the proviso to §8(b)(1)(A), per-

mitting unions to establish rules regarding the acquisition or retention of membership. But the strike itself was unlawful under §8(d), *see* note 2, *supra*, and it is by now well established that the proviso to §8(b)(1)(A) will not benefit a union in a case where its rules frustrate national labor policy.[4] *Scofield* v. *NLRB*, 394 U.S. 423, 429 (1969); *NLRB* v. *Communications Workers of America, AFL-CIO, Local 1170 (Rochester Telephone)*, 474 F.2d 778, 782 (2d Cir. 1972). The local argues that this doctrine is inapplicable here because there is no evidence that the strike's illegality motivated the strikebreakers to cross the picket lines. Subjective intent, however, is irrelevant. The strike's illegality is lessened not one whit by the personal motives of the strikebreakers, and the union, having violated the Act, must live with the consequences. It may not invoke the need to maintain loyalty in its ranks to exclude those who could have demonstrated their allegiance only by participating in unlawful activity.[5]

The local seeks to shore up its argument on the merits with a procedural claim: It contends that the charge, insofar as it relates to the denial of membership, is time-

[4] Section 8(d) "seeks, during [the] natural renegotiation period [of a collective bargaining agreement], to relieve the parties from the economic pressure of a strike or lockout in relation to the subjects of negotiation," *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 286 (1956), and accordingly is a key ingredient in the national policy of promoting industrial peace through collective bargaining.

[5] If any employee's refusal to participate in the strike had been accompanied by anti-union campaigning, attacks on the union leadership, or similar conduct, we might have a different case, for it could be argued that the denial of membership was not on account of nonparticipation in the strike but rather on account of the accompanying activity. Here, however, the sole basis for turning down the strike breakers' applications was their refusal to honor the strike.

barred under §10(b) of the Act, 29 U.S.C. §160(b) (". . . [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. . . .") The strike ended on or about February 18, 1972, the applications for membership were denied on or about August 18 of that year, and the charge was filed on February 2, 1973. If the six-month period began to run with the denials of membership on August 18, then clearly the charge was timely. But the local contends that the time must be computed from the last day of the strike, relying on *Local Lodge No. 1424, International Association of Machinists* v. *NLRB*, 362 U.S. 411, 416-17 (1960):

> It is doubtless true that §10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of §10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose §10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair

> labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

(Footnote omitted.) The local claims that, since it would not have been unlawful to exclude the strikebreakers from union membership had the strike not been an unfair labor practice, this case falls into the second category described in *Local Lodge No. 1424,* and therefore the six-month period of §10(b) must start to run from the end of the strike.

This claim is ingenious, and indeed its logic is compelling if the language of *Local Lodge No. 1424* is applied literally. Therein, however, lies the argument's undoing. We have recently warned against the literal application of language in Supreme Court opinions to different factual situations, *Wallace* v. *Kern,* —— F.2d ——, ——, slip op. 4545, 4558-59 (2d Cir. June 30, 1975); *Communications Workers of America, AFL-CIO* v. *American Telephone & Telegraph Co.,* 513 F.2d 1024, 1028 (2d Cir.), *petition for cert. filed,* 43 U.S.L.W. 3684 (U.S. June 19, 1975) (No. 74-1601), and in light of those warnings a review of the facts in *Local Lodge No. 1424* is appropriate. The union there had entered into a collective bargaining agreement containing a union security clause even though it did not represent a majority of employees—an unfair labor practice, according to prior decisions of the Board. The clause was enforced by taking dues out of employees' pay. More than six months after the negotiation of the contract an employee filed an unfair labor practice charge based on the

continued enforcement of the union security clause. That charge was held time-barred. The significant factor differentiating that case from this is that there the employee could have filed her charge at any time after the agreement went into effect. Here, however, it was only after the strikebreakers had been refused membership that they could even have considered filing a charge. The strike ended on February 18, and the denials of membership were announced on August 18, six months to the day after the strike ended—six months and one day if one starts to count from February 17, the last day of the strike, rather than February 18, the day work resumed. Thus, to sustain the local's position here would be to hold that, although an unfair labor practice occurred, there was never a time—or at most only a few hours—when a timely charge could have been filed. Surely the Court in *Local Lodge No. 1424* did not intend such a result. "It does not seem reasonable to argue that the statutory limitations period begins to run"—or may even run out—"before the violation occurs." *NLRB* v. *Plumbers & Pipe Fitters Local Union 214,* 298 F.2d 427, 428 (7th Cir. 1962). We therefore hold that the six-month time period of §10(b) began to run on August 18, 1972, the date on which the strikebreakers were denied union membership, and we sustain the Board's conclusion that this denial constituted an unfair labor practice under §8(b)(1)(A).

III. Invocation of the Agency Shop Clause.

The more difficult and troubling question presented here is whether the petitioning locals committed unfair labor practices when they sought to invoke the agency shop clause against Rigby and the strikebreakers. In finding

that they did, the Administrative Law Judge relied on two earlier Board decisions, *Local 4186, United Steelworkers of America, AFL-CIO (McGraw Edison Co.)*, 181 NLRB 992 (1970), and *Communications Workers of America, Local 9509 (Pacific Telephone and Telegraph Co.)*, 193 NLRB 83 (1971). In *McGraw Edison*, an employee who filed a decertification petition with the Board was denied the right to attend union meetings and to hold union office for one year; he thereupon refused to pay his dues, and the union demanded his discharge pursuant to a valid union shop clause.[6] The Board held that the union thereby violated §8(b)(1)(A), since its insistence on payment of dues during a period when the employee's membership rights were impaired "constituted a continuing form of coercion tending to operate as a serious restraint upon access to Board's processes." 181 NLRB 992. In *Pacific Telephone*, employees soliciting signatures in support of a decertification petition were expelled from the union; they ceased paying dues, and the union demanded their discharge.[7] Relying on *McGraw Edison*, the Board held that the union violated §8(b)(1)(A) and §8(b)(2).

To the extent that *McGraw Edison* and *Pacific Telephone* were premised on preserving a right of access to the Board, they are distinguishable; moreover, *McGraw Edison* involved a union shop rather than an agency shop clause.

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[6] A union shop clause requires union membership as a condition of employment and is specifically authorized by §8(a)(3); an agency shop is also a union security arrangement, but it requires only that employees pay the equivalent of dues, full membership in the union being optional.

[7] Whether the union security clause involved was a union shop or an agency shop clause is not specified, but the Board's opinion appears to indicate the latter. 193 NLRB 83 at 84.

In any event, those decisions are of course not binding on us, and we prefer to give the issue a fresh look.

There can be no doubt about the validity of an agency shop agreement as a permissible variant of the explicitly approved union shop agreement. That was the holding of *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). Noting that under §8(a)(3) union membership "insofar as it has significance to employment rights . . . is whittled down to its financial core," *id.* at 742, the Court found the agency shop clause to be consistent with the Act's purposes:

> We are therefore confident that the proposal made by the union here conditioned employment upon the practical equivalent of union "membership," as Congress used that term in the proviso to §8(a)(3). The proposal for requiring the payment of dues and fees imposes no burdens not imposed by a permissible union shop contract and compels the performance of only those duties of membership which are enforceable by discharge under a union shop arrangement. If an employee in a union shop unit refuses to respect any union-imposed obligations other than the duty to pay dues and fees, and membership in the union is therefore denied or terminated, the condition of "membership" for §8(a)(3) purposes is nevertheless satisfied and the employee may not be discharged for nonmembership even though he is not a formal member. Of course, if the union chooses to extend membership even though the employee will meet only the minimum financial burden, and refuses to support or "join" the union in any other affirmative way, the employee may have to become a "member" under a union shop contract, in the sense that the union may be able to place him

> on its rolls. The agency shop arrangement proposed here removes that choice from the union and places the option of membership in the employee while still requiring the same monetary support as does the union shop. Such a difference between the union and agency shop may be of great importance in some contexts, but for present purposes it is more formal than real. To the extent that it has any significance at all it serves, rather than violates, the desire of Congress to reduce the evils of compulsory unionism while allowing financial support for the bargaining agent.

Id. at 743-44 (footnotes omitted).

Seizing on the notion of the payment of dues as the practical equivalent of membership, the locals argue that there are really two kinds of union membership: full membership and "financial core" membership. In the case of an agency shop, it is claimed, financial core membership—simply maintaining one's dues—is all that the Act means when it refers to membership; and so when it is said that an employee can be discharged if his membership is refused or terminated for failure to pay dues, financial core membership is all that is meant. Thus, when Rigby and the strikebreakers applied for *full* membership and were turned down, they were not denied financial core membership; that denial occurred only when they subsequently refused to pay dues, and was clearly based on that refusal. Therefore, the argument goes, membership—financial core membership—was denied for the failure to pay dues, and it was proper under §8(b)(2) for the locals to seek the employees' discharges.

This argument has some appeal, largely because of the manner in which the Court in *General Motors* justified

agency shops. However, we must reject it, for instead of accommodating the agency shop to the Act, it twists the Act to accommodate this version of the agency shop. In *General Motors,* the Court approved agency shop agreements, but only within the confines of the Act; it did not amend the Act to authorize any possible side effects of agency shop agreements that might run afoul of statutory purposes. As the Court noted, in approving union shops the Congress wanted not only to protect unions from free riders but also to minimize the abuses of compulsory unionism. 373 U.S. 734 at 740-41. This second goal was effected by circumscribing the grounds on which a union could invoke a union shop clause to seek an employee's discharge: Under §8(b)(2) if an employee's membership is denied or terminated for reasons other than the failure to pay dues, the union may not cause the employer to discriminate against the employee. The argument urged on us by the locals in this case would in effect read the notion of a reason other than the failure to pay dues out of the Act, and thereby eliminate the Congress' carefully placed wedge against compulsory unionism. For by definition, under the locals' scheme, there can be no reason for the denial of financial core membership except the failure to pay dues, since financial core membership means nothing more nor less than the fact that an employee pays his dues. We hold, therefore, that in order to give meaning to the "other than his failure to tender the periodic dues" clause of §8(b)(2), we must look to the reason for denial of full membership, not the reason for denial of financial core membership.[8] Where, as here, the denial of full member-

[8] The locals claim that a recent decision, *NLRB* v. *Hershey Foods Corp.*, 513 F.2d 1083 (9th Cir. 1975), is contrary to this conclusion. We disagree. There an employee resigned from the

ship was not for the failure to pay dues, but rather for engaging in protected activity, the union's attempt to invoke the agency shop clause violates §8(b)(1)(A) and §8(b)(2). *NLRB* v. *Bell Aircraft Corp.*, 206 F.2d 235 (2d Cir. 1953).

We also note that the local's interpretation of their agency shop clause is contrary to the Supreme Court's understanding, enunciated in *General Motors,* of what an agency shop entails. Such an agreement, said the Court, "places the option of membership in the employee while still requiring the same monetary support as does the union shop." 373 U.S. 734 at 744. If the locals prevail here, they will have arrogated to themselves the employees' choice regarding union membership while nonetheless requiring them to pay dues.[9] A union should not, under the circumstances here presented, be entitled to exact dues from employees after depriving them of their membership options by excluding them from its ranks. This conclusion follows rather easily in the Telco case, where the exclusion itself was unlawful;

union but offered to pay his dues. The union claimed that this was not enough under the controlling union shop clause, and caused the employer to discharge the employee. It was held that under the union shop clause an employee could only be compelled to maintain financial core membership, that the employee had fulfilled this requirement, and that his discharge was therefore an unfair labor practice. That decision can coexist peacefully with ours; the rule resulting from a combination of the two cases would appear to be that, although a union, even under a union shop clause, cannot compel any greater degree of membership than financial core membership, it must nonetheless, even under an agency shop clause, grant full membership to those employees who desire it if it wants to retain its right to receive their dues.

[9] In *General Motors, supra,* 373 U.S. 734 at 745 n. 12, the Court specifically noted that "the significance of desired, but unavailable, union membership, or the benefits of membership, . . . we leave for another case."

the Rigby case, where the exclusion was apparently proper, is more difficult, but in light of the considerations set forth in the previous paragraph we see no reason for reaching a different decision.

A third factor influencing our rejection of the locals' position is that it would lead to incongruous results. An agency shop is generally viewed as a weaker form of union security agreement than a union shop; it "imposes no burdens not imposed by a permissible union shop contract and compels the performance of only those duties of membership which are enforceable by discharge under a union shop arrangement." *NLRB* v. *General Motors Corp., supra,* 373 U.S. 734 at 743. Under a union shop clause, it is clear that one would look to the reason for denial of full membership in determining whether there was a violation of §8(b)(2). *See, e.g., Union Starch & Refining Co.* v. *NLRB,* 186 F.2d 1008 (7th Cir.), *cert. denied,* 342 U.S. 815 (1951). Yet under the union's theory here the reasons for the denial of full membership would become irrelevant, in effect giving the union a greater degree of coercive power over employees than it would have in the case of a union shop.

The *Union Starch* case, *supra,* is not, as the locals contend, contrary to our decision here. There the union refused membership to employees who tendered dues but would not take an oath of loyalty. At the union's invocation of a union shop clause, the employer discharged the employees. This was held to be an unfair labor practice since the employees were denied membership for their refusal to take the oath, and not for their failure to pay dues. The locals contend that this decision was predicated on the fact that the employees did in fact tender their dues, and that the court would not have found an unfair labor practice had there not been a tender of dues. Speculating on what

a court would have decided had a different set of facts been before it is a hazardous business, however, and we find no need to engage in it here. Whether or not the employees continued to pay dues after the rejection of their initial tender was simply not considered by the court in *Union Starch.* The locals have argued the significance of that fact here because we are dealing with an agency as opposed to a union shop, but our interpretation of the status of the agency shop under the Act renders it largely irrelevant. As did the court in *Union Starch,* we have looked only to the reasons for the denial of full membership; here, as there, that denial was on grounds other than the failure to pay dues. Our decision that the subsequent invocation of the agency shop clause was an unfair labor practice is thus consistent with what was actually decided in *Union Starch,* and we decline to consider whether it would be consistent with what the court there might have decided under a different set of facts.

One final point deserves brief comment. The locals claim that enforcement of the Board's order would violate fundamental national labor policy in that it would render unions, which as exclusive bargaining agents have a duty of fairly representing all employees, *Vaca* v. *Sipes,* 386 U.S. 171, 177 (1967), helpless to prevent free riders from enjoying the benefits of union representation while avoiding their fair share of the costs. *See Radio Officers' Union* v. *NLRB,* 347 U.S. 17, 41 (1954). This argument has little merit in the Telco case since the strikebreakers wanted to join the union and pay dues and their exclusion was itself unlawful. In Rigby's case, however, a germ of a free rider problem does present itself: The union was within its rights in denying his membership application, and after our decision here it will either have to take him in or

forego his financial support. While Rigby will in effect be a free rider, we do not think the problem to be of significant dimension. Our decision does not invite all employees simply to stop paying dues, for if they do that and nothing more they will be subject to discharge. The only free riders will be those who, like Rigby, are lawfully excluded from the union for activity that, though protected by §7, is disloyal to the union. And if the number of such employees rises to the point where the lack of their dues becomes serious, the union will most likely be suffering from problems greater than free riders. Thus, while our decision necessarily entails some inroads on a union's ability to protect itself from free riders, the invasion is not serious. A contrary decision would create far greater problems of compulsory unionism, the elimination of which is as much a part of national labor policy as is the competing goal of protecting unions from free riders. Absent explicit legislative instruction, we prefer the result that appears to us to entail the lesser sacrifice.

The petition for review is denied and the Board's cross-application for enforcement is granted.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-2044
No. 74-2230

LOCAL 1104, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, and LOCAL 1101, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO.

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

NEW YORK TELEPHONE COMPANY AND WELLINGTON G. RIGBY,

Intervenors.

JUDGMENT

Before:

SMITH, ANDERSON and OAKES,

Circuit Judges.

THIS CAUSE came on to be heard upon the petition of Local 1104, Communications Workers of America, AFL-CIO, and Local 1101, Communications Workers of America, AFL-CIO, to review an order of the National Labor Relations Board issued against said Petitioners, their officers, agents and representatives and upon the Board's cross-application for enforcement of said order. The Court heard argument of respective counsel on June 5, 1975, and has considered the briefs and transcript of the record filed in this cause. On July 21, 1975, the Court being fully advised in the premises, handed down its opinion denying the petition for review and granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Local 1104, Communications Workers of America, AFL-CIO and Local 1101, Communications Workers of America, AFL-CIO, their officers, agents, and representatives abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that costs shall be taxed against the Petitioners.

/s/ J. JOSEPH SMITH
Judge, United States Court of Appeals for the Second Circuit

/s/ JAMES L. OAKES
Judge, United States Court of Appeals for the Second Circuit

APPENDIX C

Decision and Proposed Order of Administrative Law Judge

JD-788-73
New York, N.Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

WASHINGTON, D.C.

LOCAL 1104, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

(NEW YORK TELEPHONE COMPANY)

and

WELLINGTON G. RIGBY, An Individual
Case No. 29-CB-1347-3

LOCAL 1101, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

and

NEW YORK TELEPHONE COMPANY
Case No. 29-CB-1426

JOEL FRIEDMAN, ESQ., for the General Counsel.

H. HOWARD OSTRIN, ESQ., for the Respondent.

FREDERICK D. BRAID, ESQ., appearing on behalf of Charging Party Rigby.

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HOWARD YAKER, ESQ., appearing on behalf of Charging Party New York Telephone Company.

STATEMENT OF THE CASE

JOHN P. VON ROHR, Administrative Law Judge: Upon charges, duly filed, the General Counsel of the National Labor Relations Board, by the Regional Director for the Twenty-Ninth Region (Brooklyn, New York) issued complaints, consolidated in this proceeding, against Local 1101 and Local 1104, Communications Workers of America, AFL-CIO, herein called the Respondents or the Unions, alleging that they had engaged in certain unfair labor practices in violation of Sections 8(b)(1)(A) and (2) of the Act.[1] Respondents filed an answer denying the allegations of unlawful conduct alleged in the complaint. Pursuant to notice, a hearing was held before Administrative Law Judge John P. von Rohr in Brooklyn, New York, on October 24 and 25, 1973. Briefs were received from the General Counsel, the Respondents and the Charging Parties on December 3, 1973 and they have been carefully considered. Upon the entire record in this case, and from my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

New York Telephone Company, also referred to in the complaint as Telco, is a New York corporation maintaining its office and principal places of business in the City and

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[1] The complaint in Case No. 29-CB-1347-3 issued on January 31, 1973, and was based on a charge filed on October 17, 1972. A complaint and an amended complaint in Case No. 29-CB-1426, issued on March 27, 1973, and October 12, 1973, respectively. The charge in this case was filed on February 2, 1973.

State of New York where it is engaged in providing telephone communication and related services. During the year preceding the issuance of the complaint, Telco derived gross revenues from its operations in excess of $500,000. During the same period it purchased goods and material valued in excess of $50,000 from points and places located outside the State of New York. The parties concede, and I find, that New York Telephone Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Locals 1101 and 1104, Communications Workers of America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Background*

The facts in this case are essentially undisputed.[2] The Communications Workers of America, AFL-CIO, is the collective-bargaining representative for employees in a num-

[2] The facts pertinent to the background of this case, as well as other facts relative to the issues herein, are principally set forth in *Local 1101 and Local 1104, Communications Workers of America, AFL-CIO,* Case No. 2-CB-5172, *et al.,* the transcript and exhibits of which the parties have agreed to stipulate as part of the record in the instant proceeding. Judge Benjamin K. Blackburn has issued his decision in this proceeding on September 4, 1973 (JD-537-73). In setting forth the background and other factual matters herein, I have borrowed freely from the facts, which are uncontested, as set forth in Judge Blackburn's Decision as well as from those set forth in the brief submitted by Charging Party New York Telephone Company. Respondent's brief does not include any detailed statement of facts, presumably because they are not in material dispute.

ber of separate bargaining units in the Bell system, including the New York Telephone Company. The Respondent locals are constituent locals of their CWA parent, Local 1101 having jurisdiction over Suffolk County, New York and Local 1104 over Nassau County, New York. These are located in the New York City Metropolitan area and thus are "downstate," as distinguished from various "upstate" locals.

In 1971, as in the past, CWA and the Bell System bargained nationally on a pattern basis, the Western Electric Company and the Chesapeake and Potomac Telephone Company have been selected as the pattern makers. Negotiations with these parties began in the spring of 1971 and were expected to set the pattern for settlements with the other Bell System Companies. These negotiations resulted in a nationwide telephone strike which began on July 14, 1971, and ended on July 21, 1971.

CWA's contract with New York Telephone Company having an expiration date of July 28, 1971, the parties to this agreement began negotiations for a new contract on July 6, 1971. The Union bargaining committee consisted of two representatives of Local 1101, the President of Local 1106, and representatives of Locals 1107, 1122 and 1126, and was chaired by Don Sanchez, CWA's area director and chairman of its bargaining committee. Following meetings on July 7 and 9, Sanchez cancelled a meeting scheduled for July 13 so that the bargaining committee members could return to their home locals in New York State to carry out their duties in connection with the nationwide strike scheduled to begin the new day. Negotiations resumed on July 14 and continued to July 18. On July 14, 2000 employees of the approximately 39,000 unit employees of New York Telephone reported to work.

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The national negotiations resulted in an agreement on July 18, 1971, subject to ratification by employees on a unit basis. The CWA National Executive Board thereupon terminated the strike and directed all members to return to work on July 21 pending results of the ratification vote. The New York locals, however, including the Respondent Locals in this proceeding, opposed the settlement agreement and remained on strike.[3]

On August 19, 1971, the New York Telephone Company resumed negotiations with the CWA. On August 26, CWA formally authorized the strike of the New York locals which then was continuing in effect. A new contract between CWA and the New York Telephone Company was finally ratified on February 16, 1972, and the New York strike was terminated on February 18, 1972.

During the course of the strike, employees of New York Telephone Company, in varying numbers and at various times, including those hereinafter named, reported for work and crossed picket lines. Some employees resigned from the Union before returning to work while others were never members of the Union.

Prior to the latest (1972) contract, the collective bargaining agreements between CWA and Telco contained only a maintenance of dues provision. However, the agreement of February 1972 for the first time contained a so-called "agency shop" provision. The language of this clause provides as follows:

> 33.01 Each regular employee shall, as a condition of employment, pay or tender to the Union amounts equal to the periodic dues applicable to members for the

[3] Three upstate CWA locals returned to work in compliance with the CWA National Board directive.

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> period beginning 30 days after hire or 30 days after February 17, 1972, whichever occurs later, until the termination of this collective bargaining agreement, except that an employee may terminate this condition of employment by giving a written individual notice to the Company and the Union of such termination by certified or registered mail, return receipt requested, and postmarked between July 8, 1974 and July 17, 1974 both dates inclusive.

B. *The Allegation that Respondent Local 1101 Unlawfully Sought the Discharge of Employees for Failure to Pay Dues, While Denying Them Union Membership.*

The facts concerning the above allegations are brief and not in dispute. Thus, the parties stipulated that during the month of July 1972, the following employees applied for membership in Respondent Local 1101 pursuant to the agency shop clause in the contract:

Mary Semanicki	Tyrone Hecker
Guiseppe Arrigo	Alice Allen
C. Clumysun	Anthony Perillo
Leon Pantin	William Haydak
Onkar Singh	Donald MacMillan
J. R. Swart	Carl Bryan
Clarence Meekins	John Schreiner
Frank Fyall	Nelson Phitts
Joseph Fiumano	John Munday
Wun Yee Poon	John Martinez
Frederick Brown	Lala Jones
Remo Bellioli	Douglas Goodman
Theodore Braithwaite	Mary Myhalko
Eugene Sullivan	W. Jurevyszyn
Gordon St. Louis	

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It is further undisputed that each of the above employees signed check-off cards authorizing the Company to deduct union dues from their pay. However, as Respondent concedes, on or about August 18, 1972, the membership applications of each of the above employees were rejected solely because they refused to participate in the strike and had crossed the picket lines established by Local 1101.[4] Finally, it is undisputed that upon denial of membership, the above employees refused to tender amounts equivalent to union dues to Local 1101, whereupon this Respondent, on or about December 4, 1972, requested the Company that they, and each of them, be discharged under the agency shop provision of the collective-bargaining agreement.

Concerning all the foregoing, the complaint in Case No. 29-CB-1426 substantially alleges that Respondent Local 1101 violated Section 8(b)(1)(A) and 8(b)(2) by demanding that the New York Telephone Company, on or about December 4, 1972, discharge the above-named employees for failure to pay dues, under the Agency Shop provision of the contract, following its rejection of their applications for membership because they crossed Respondent's picket line during the strike against the Company from July 1971 to February 1972.

As a starting point in deciding the issue presented above, I think it well to first cite the applicable provision of the Act. Thus, Section 8(b)(2) makes it an unfair labor practice for a labor organization:

> "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an em-

[4] Respondent's answer admits the allegation in the complaint that the denial of membership occurred on or about August 18, 1973.

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> ployee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Section 8(a)(3) of the Act, which set forth the requirements of lawful union-security agreements, in relevant counterpart makes it an unfair labor practice for an employer by discrimination in regard to the hire or tenure or condition of employment to encourage or discourage membership in any labor organization:

> (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of requiring or retaining membership.

Recognizing the obvious difference between a union security agreement, and an agency shop agreement both the General Counsel and the Respondents cite the case of *National Labor Relations Board* v. *General Motors Corporation,* 373 U.S. 734 (1963) in support of their respective positions concerning the alleged violations herein. However, the Supreme Court's decision in that case, as I read it, in essence goes no further than to hold that an agency shop is a *permissable* form of union security under the Act. Other than that, and apart from any far reaching arguments which can be made only by citing certain dicta taken out of context from the whole, I fail to see where the *General Motors* decision, *supra,* has any material bearing upon the issue presented in the present case.

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More to the point, the General Counsel urges that the instant proceeding is analogous to issues presented and decided in *Local 4186, United Steelworkers of America, AFL-CIO (McGraw Edison Company)*, 181 NLRB 992 and *Communications Workers of America, Local 9505 (The Pacific Telephone and Telegraph Company)*, 193 NLRB 83. In the *McGraw Edison* case the union denied an employee the right to attend union meetings and to hold office for a period of 1 year for the reason that he previously had filed a decertification petition with the Board. When the employee thereupon refused to pay dues, the Union, under a valid union-security clause in the collective-bargaining agreement, threatened to seek his discharge. Under these facts the Board held that "a labor organization violated Section 8(b)(1)(A) by invoking, or threatening to invoke a lawful union-security clause to enforce payment of dues by a member whose membership has been significantly impaired because he filed a decertification petition." In so finding, the Board first made it clear that it was not dealing with the Union's internal right to discipline a member because he filed a decertification petition, but rather that it was the insistence of payment of dues upon penalty of discharge while membership was impaired that constituted the unlawful conduct. The Board further stated:

> However, Respondent's insistence upon Blaine's continued payment of dues during periods when his rights as a member were significantly reduced constituted a continuing form of coercion tending to operate as a serious restraint upon access to Board processes. The Union's insistence upon Blaine's payment of dues, on pain of discharge, cannot be considered as disassociated from the suspension of membership rights resulting from his decertification activity. We see no justification, either in the proviso to Section 8(b)(1)(A) or in considerations of a labor organization's need for self-preservation, for the steps taken against Blaine. The threat to enforce the union security clause while continuing the sanctions against Blaine was hardly necessary to preserve the Union's existence as an institution, nor could it be viewed as a noncoercive form of internal discipline which would have no discouraging effect upon a member's decision to invoke the Board's representation procedures.

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The *Pacific Telephone* case, *supra*, involved substantially the same factually situation as *McGraw Edison*, except that the employees there involved had been disciplined by expulsion from the Union, rather than by impairment of membership privileges, for having filed a decertification petition. In addition to finding a Section 8(b)(1)(A) violation, the Board in *Pacific Telephone* found that the Union violated Section 8(b)(2) of the Act for in fact having demanded the employer to discharge the employees under the Union shop provision of the contract.

Returning to *McGraw Edison*, the Board found it unnecessary to pass upon the essentially related question presented in the instant case and specifically noted as follows:

> As our decision in this case is based on the coercive steps taken as a result of filing a decertification petition, we need not pass on whether a labor organization violated 8(b)(1)(A) through enforcement of a union security clause against a member whose membership was impaired for reasons unrelated to seeking access to board decertification processes.

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Passing upon this point, as I now must, and for the moment restricting this view to a union-security situation, I find there are compelling reasons for extending the Board's holding in *McGraw Edison* and *Pacific Telephone* to apply to situations where membership is denied or impaired because of employees' exercise of rights guaranteed them under Section 7 of the Act. Thus, it is hardly necessary to cite authority for the proposition that a primary function of the Board has been to protect Section 7 rights. It is equally clear that the refusal of employees to cross a picket line during a strike is one of the rights guaranteed by Section 7. Accordingly, if the Board deems it necessary to protect the right of "providing unimpeded access to its procedures and remedies," as it stated in *McGraw Edison,* I would find that, in effectuating the policies of the Act, the Board is equally obligated to protect the rights of employees arising under Section 7 of the Act. It follows, therefore, and I would hold, that a labor organization violates Section 8(b)(1)(A) and 8(b)(2) of the Act by invoking a lawful union-security clause to enforce payment of dues where employees have been denied union membership for exercising a right (crossing a picket line during a strike) guaranteed by Section 7 of the Act.

Assuming the validity of the premise as aforesaid, the issue further presented is whether this principle should be, extended to an analagous situation, but involving the enforcement of an agency shop rather than union shop provision. For the reasons stated below, I am persuaded that this question should be answered in the affirmative.

To begin with, it is hardly open to question that an agency shop arrangement provides a labor organization with a lesser form of union security than does a lawful union shop arrangement. In fact, and as is apparent from

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the facts in the *General Motors* case, *supra,* the very concept of an agency shop arrangement originated with a labor organization and was intended to be utilized as a device to protect labor organizations against "free rides" in states where otherwise lawful union security arrangements are prohibited by right-to-work laws. Accepting, then, the undeniable fact of the agency shop being a "less severe form of union security arrangement" [5] than the union shop, it surely would be anomalous to hold that, under equivalent circumstances, a labor organization should be invested with greater rights to enforce the collection of dues as a condition of employment under an agency shop agreement. Further, since it is well settled that under a union shop an employee has the option to refrain from becoming a union member, as long as he tenders his dues,[6] a similarly anomalous result would be reached if this option no longer would be available to an employee under an agency shop situation.

In short, I think it contrary to all common sense and the mandate of the Act to allow the Union here to selectively choose its membership while at the same time retaining

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[5] *General Motors, supra.*

[6] Thus, in *Union Starch & Refining Co.,* 87 NLRB 779, enfd. 186 F. 2d 1008, cert. denied, 342 U.S. 815, the Board stated:

> If the union imposes any qualifications and conditions for membership with which he is unwilling to comply, such an employee may not be entitled to membership, but he is entitled to keep his job. Throughout the amendment to the Act, Congress evinced a strong concern for protecting the individual employee in a right to refrain from union activity and to keep his job even in a union shop. Congress carefully limited the sphere of permissible union security and even in that limited sphere accorded the union no power to affect the discharge of nonmembers except to protect itself against "free rides."

the right to insist upon payment of dues as a condition of employment. This, as has been discussed above, it could not do under the more stringent form of a union shop arrangement.

Accordingly, and in view of all the foregoing, I find that by demanding the discharge of the above-named employees for failure to pay sums equivalent to union dues, after having denied them union membership because they crossed the picket line, Respondent Local 1101 violated Section 8(b)(1)(A) and (2) of the Act.

C. *The Case of Wellington G. Rigby (Local 1104)*

Except for the factual differences discussed below, Rigby's case is not unlike the cases of the employees discussed above.

Rigby has been in continuous employ of New York Telephone Company since July 6, 1968. He became a member of Respondent Local 1104 in May 1969 and remained a member until July 7, 1971, at which time he resigned his union membership in accordance with the collective-bargaining agreement then in effect. Rigby did not work during the strike referred to in the preceding section herein, but returned to work after the strike had been settled. Thereafter, in the spring of 1972, Rigby engaged in organizing activities upon behalf of the Teamsters Union. On or about July 20, 1972, at which time he had ceased his activities upon behalf of the Teamsters, Rigby applied for membership in Respondent Local 1104. At the same time he executed a dues checkoff card, authorizing the Company to deduct membership dues from his wages. It is undisputed that on September 5, 1972, Respondent Local 1104

rejected Rigby's application for membership solely on the ground that he had engaged in organizational activities on behalf of a rival union, i.e., a Teamster local.[7] Thereafter, upon Rigby's refusal to tender amounts of money equivalent to union dues under the agency shop provision of the contract, Respondent Local 1104 requested the New York Telephone Company to terminate his employment for failure to pay the agency shop fee.

Just as the employees who crossed the picket line were engaged in the exercise of a Section 7 right, Rigby's participation in organizational activities on behalf of the Teamsters Union was a right also protected by Section 7 of the Act. Accordingly, and for all the reasons set forth in the preceding Section, I find that Respondent Local 1104, by seeking the discharge of Rigby for failure to pay the agency shop fees, after having denied his membership for engaging in organizing activities on behalf of a rival union, violated Section 8(b)(1)(A) and (2) of the Act.

E. *The Allegation that Respondent Local 1101 Violated Section 8(b)(1)(A) By Denying Membership to Employees who Crossed Its Picket Line*

Apart from the allegations pertaining to Respondent's request that employees be terminated for failure to pay the equivalent of union dues, the General Counsel further contends that the denial of membership to the employees previously named herein (exclusive of Rigby) was *itself* unlawful because the basis for such denial was their crosing

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[7] Respondent's answer states that on September 2, 1972, Rigby "reiterated his earlier request for admission to union membership."

of Respondent's picket line during the strike.[8] Conceding that Respondent's denial of membership to these employees would not violate the Act if the strike was lawfully called, the particular basis for this contention is premised on the further allegation that CWA and Local 1101 engaged in the strike without meeting the notice requirements of Section 8(d) of the Act. Insofar as the latter allegations are concerned, this issue has been raised and litigated in *Local 1101 and Local 1104, Communications Workers of America, AFL-CIO (New York Telephone Company, et al)* Case Nos. 2-CB-5172, 2-CB-5141, et al., in which Administrative Law Judge Benjamin K. Blackburn issued his decision on September 4, 1973 (JD-537-73). For the reasons stated therein, I agree with and adopt the findings, and accordingly herein find, that Respondent Local 1101 engaged in the strike (which commenced on July 14, 1971 and continued to on or about February 17, 1972) without meeting the requirements of Section 8(d) of the Act.[9]

It is now well established that, notwithstanding the proviso to Section 8(b)(1)(A) of the Act which confers upon labor organizations the right to prescribe their own rules with respect to the acquisition or retention of membership, a union may nonetheless commit an unfair labor practice if it takes certain disciplinary action against mem-

[8] I find no merit to Respondent's contention that the allegation here at issue is barred by Section 10(b) of the Act. The alleged violation here was Respondent's denial of membership to the employees, which occurred on or about August 18, 1972. This was well within the period covered by the charge herein, which was filed on February 2, 1973.

[9] The parties involved having been previously served Administrative Law Judge Blackburn's decision, I see no need to further burden Board costs and duplication processes by hereto attaching a copy of that decision.

bers for the purpose of enforcing union rules which are violative of the Act or of public policy. Thus, in upholding the Board's finding that expulsion from the Union for filing charges with the Board violated Section 8(b)(1)(A) the Supreme Court, in *N.L.R.B.* v. *Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO,* 391 U.S. 418, stated "Section 8(b)(1)(A) assures a union freedom of self-regulation where its internal affairs are concerned. But where a union rule penalizes a member for filing an unfair labor practice charge with the Board, other considerations of public policy came into play."

In a later case, *Scofield* v. *N.L.R.B.,* 394 U.S. 423; the Supreme Court elaborated further with the following:

> Under this dual approach, Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, *impairs no policy Congress has embedded in the labor laws,* and is reasonably enforced against union members who are free to leave the union and escape the rule.
>
> (Emphasis supplied)

Since the Respondent here engaged in a strike without complying with the provisions of Section 8(d) of the Act, thus clearly impairing a policy which Congress has embedded in the labor laws, I find that Respondent's action in denying membership to employees who refused to cross the picket line during the strike in question constituted restraint and coercion within the meaning of Section 8(b)(1)(A) of the Act.[10]

[10] *Communication Workers of America, AFL-CIO, Local 1170 (Rochester Telephone),* 194 NLRB 872. For related cases see also *Local 12419, District 50, United Mine Workers of America (Na-*

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IV. The Effect of the Unfair Labor Practice Upon Commerce

The activities of the Respondents set forth in section III, above, occurring in connection with the operations of the employer described in section I, above, have a close, intimate and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondents have engaged in unfair labor practices violative of Section 8(b)(1)(A) and 8(b)(2) of the Act, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. New York Telephone Company is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondents Local 1101 and 1104, Communications Workers of America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. By requesting the discharges of the employees heretofore named in this Decision unless they paid amounts

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tional Grinding Wheel Company), 176 NLRB 628: *Glaziers Local No. 1162 (Tusco Glass, Inc.)*, 177 NLRB 393; *International Molders and Allied Workers Union, Local 125 (Blackhawk Tanning Co.)*, 178 NLRB 208.

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equal to periodic dues, while simultaneously denying them union membership because they crossed Respondents' picket line, Respondent Local 1101 restrained and coerced these employees in the exercise of rights guaranteed them in Section 7 of the Act and by attempting to cause New York Telephone Company to discriminate against these employees in violation of Section 8(a)(3) of the Act, is thereby engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

4. By requesting the discharge of Wellington G. Rigby unless he paid amounts equal to the periodic dues, while simultaneously denying him union membership because he engaged in organizational activities on behalf of another labor organization, Respondent Local 1104 restrained and coerced Rigby in the exercise of rights guaranteed in Section 7 of the Act and by attempting to cause New York Telephone Company to discriminate against him in violation of Section 8(a)(3) of the Act, is thereby engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

5. By denying union membership to employees for crossing a picket line established by Respondent, Respondent Local 1101 restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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On the basis of the above findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following:[11]

ORDER

Local 1101, Communication Workers of America, AFL-CIO, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Requesting the discharge of employees pursuant to an agency shop contract unless they pay amounts equivalent to periodic dues while simultaneously denying them union membership for crossing a picket line established by Respondent.

(b) Denying membership to employees for crossing a picket line during a strike called by the Respondent without first complying with the provisions of Section 8(d) of the Act.

(c) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon tender of periodic dues and initiation fees, offer union membership to the following employees whom

[11] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

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Respondent previously denied membership because they crossed the picket line during the strike beginning on July 14, 1972 and ending on February 18, 1972:

Mary Semanicki	Tyrone Hecker
Guiseppe Arrigo	Alice Allen
C. Clumysun	Anthony Perillo
Leon Pantin	William Haydak
Onkar Singh	Donald MacMillan
J. R. Swart	Carl Bryan
Clarence Meekins	John Schreiner
Frank Fyall	Nelson Phitts
Joseph Fiumano	John Munday
Wun Yee Poon	John Martinez
Frederick Brown	Lala Jones
Remo Bellioli	Douglas Goodman
Theodore Braithwaite	Mary Myhalko
Eugene Sullivan	W. Jurevyszyn
Gordon St. Louis	

(b) Post at its offices, and meeting hall copies of the attached notice marked "Appendix A."[12] Copies of said notices on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days in conspicuous places, including all places where notices to em-

[12] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

ployees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(c) Additional copies of the Appendix A shall be signed by the representative of the Respondent union and forthwith returned to the Regional Director for Region 29. These notices shall be posted, the New York Telephone Company willing, in all places where notices to its employees are customarily posted.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order what steps the Respondent has taken to comply herewith.

Respondent Local 1104, Communications Workers of America, AFL-CIO, its officers agents, successors, assigns shall:

1. Cease and desist from:

(a) Requesting the discharge of employees pursuant to an agency shop contract unless they pay amounts equivalent to periodic dues while simultaneously denying them membership because of their activities in support of another union.

(b) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act.

(a) Post at its offices and meeting halls copies of the attached notice marked "Appendix B."[13] Copies of said

[13] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice

notices on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Additional copies of Appendix B shall be signed by the representative of the Respondent Union and forthwith returned to the Regional Director for Region 29. These notices shall be posted, the New York Telephone Company willing, at all places where notices to its employees are customarily posted.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order what steps the Respondent has taken to comply herewith.

Dated at Washington, D.C.

/s/ JOHN P. VON ROHR
Administrative Law Judge

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reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX A

(See Opposite) ☞

FORM NLRB-4726
(4-74)

APPENDIX A

JD-788-73

NOTICE TO MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT request the discharge of employees purusant to an agency shop contract unless they pay amounts equal to our periodic dues while simultaneously denying them union membership for crossing a picket line during a strike.

WE WILL, upon their tender of union dues and initiation fees, offer membership to the below-named employees whom we have previously denied membership for crossing a picket line during our strike against the New York Telephone Company which ended on February 18, 1972, in which we participated without having first afforded the Company a timely opportunity to bargain within the meaning of Section 8(d) of the Act.

Mary Semanicki
Guiseppe Arrigo
C. Clumysun
Leon Pantin
Onkar Singh
J. R. Swart
Clarence Meekins
Frank Fyall
Joseph Fiumano
Wun Yee Poon
Frederick Brown
Remo Bellioli
Theodore Braithwaite
Eugene Sullivan
Gordon St. Louis
Tyrone Hecker
Alice Allen
Anthony Perillo
William Haydak
Donald MacMillan
Carl Bryan
John Schreiner
Nelson Phitts
John Munday
John Martinez
Lala Jones
Douglas Goodman
Mary Myhalko
W. Jurevyszyn

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

LOCAL 1101, COMMUNICATION WORKERS OF AMERICA, AFL-CIO
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street - 4th Floor, Brooklyn, New York 11241 (Tel. No. 212-596-3535).

APPENDIX B

(See Opposite) ☞

FORM NLRB-4728
(4-71)

APPENDIX B

JD-788-73

NOTICE TO MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT request the discharge of employees unless they pay amounts equal to our periodic dues, while simultaneously refusing them union membership because they have engaged in activities upon behalf of another union.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

LOCAL 1104, COMMUNICATION WORKERS OF AMERICA, AFL-CIO
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street - 4th Floor, Brooklyn, New York 11241 (Tel. No. 212-596-3535).

Decision and Order of National Labor Relations Board

FKP

211 NLRB No. 18

D—8766
Brooklyn, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 29-CB-1347-3

LOCAL 1104, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

(NEW YORK TELEPHONE COMPANY)

and

WELLINGTON G. RIGBY, an Individual

Case 29-CB-1426

LOCAL 1101, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

and

NEW YORK TELEPHONE COMPANY

On December 28, 1973, Administrative Law Judge John P. von Rohr issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Respondents filed exceptions and supporting briefs and the charging parties filed answering briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Decision and Order of National Labor Relations Board

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondents Locals 1101 and 1104, Communications Workers of America, AFL-CIO, their officers, agents, and representatives, shall take the action set forth in the said recommended Order.

Dated: Washington, D.C.
June 6, 1974

.....
John H. Fanning, Member

.....
Ralph E. Kennedy, Member

.....
John A. Penello, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

[1] The Administrative Law Judge inadvertently found that Rigby's employment by the Company began in 1968; the correct date is 1948. Similarly, the Administrative Law Judge inadvertently found that membership had been denied to employees who "refused to cross the picket line," ALJD, last par. of sec. E. He clearly intended to find that membership had been denied to employees who crossed the picket line and his Decision is hereby corrected accordingly. We also note that, although the Administrative Law Judge refers to his observation of the witnesses, there were no witnesses and no issues involving credibility.

APPENDIX D

Excerpts From the Report of the Senate Committee on Labor and Public Welfare to Accompany S. 1126

(S. Rept. 105, 80th Cong., 1st Sess.)

(Excerpts from the Senate Report pp. 5-7, 21; 1 Legislative History of the Labor-Management Relations Act of 1947, pp. 411-413, 427.)

Compulsory Union Membership

A controversial issue to which the committee has devoted the most mature deliberation has been the problem posed by compulsory union membership. It should be noted that when the railway workers were given the protection of the Railway Labor Act, Congress thought that the provisions which prevented discrimination against union membership and provided for the certification of bargaining representatives obviated the justification for closed-shop or union-shop arrangements. That statute specifically forbids any kind of compulsory unionism.

The argument has often been advanced that Congress is inconsistent in not applying this same principle to the National Labor Relations Act. Under that statute a proviso to section 8(3) permits voluntary agreements for compulsory union membership provided they are made with an unassisted labor organization representing a majority of the employees at the time the contract is made. When the committees of the Congress in 1935 reported the bill which became the present National Labor Relations Act, they made clear that the proviso in section 8(3) was not intended to override State laws regulating the closed shop. The Senate committee stated that "the bill does nothing to

facilitate closed-shop agreements or to make them legal in any State where they may be illegal" (S. Rept. No. 573, 74th Cong., 1st sess., p. 11; see also H. Rept. No. 1147, 74th Cong., 1st sess., pp. 19-20). Until the beginning of the war only a relatively small minority of employees (less than 20 percent) were affected by contracts containing any compulsory features. According to the Secretary of Labor, however, within the last 5 years over 75 percent now contain some form of compulsion. But with this trend, abuses of compulsory membership have become so numerous there has been great public feeling against such arrangements. This has been reflected by the fact that in 12 States such agreements have been made illegal either by legislative act or constitutional amendment, and in 14 other States proposals for abolishing such contracts are now pending. Although these regulatory measures have not received authoritative interpretation by the Supreme Court (see *A. F. of L.* v. *Watson*, 327 U.S. 582), it is obvious that they pose important questions of accommodating Federal and State legislation touching labor relations in industries affecting commerce (*Hill* v. *Florida*, 325 U.S. 538; see also, *Bethlehem Steel Co.* v. *N. Y. Labor Board*, decided by the Supreme Court April 7, 1947). In testifying before this committee, however, leaders of organized labor have stressed the fact that in the absence of such provisions many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost.

The committee has taken into consideration these arguments in reaching what it considers a solution of the problem which does justice to both points of view. We have felt that on the record before us the abuses of the system have become too serious and numerous to justify permit-

ting present law to remain unchanged. It is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated. In the maritime industry and to a large extent in the construction industry union hiring halls now provide the only method of securing employment. This not only permits unions holding such monopolies over jobs to exact excessive fees but it deprives management of any real choice of the men it hires. Extension of this principle to licensed deck and engine officers has created the greatest problems in connection with the safety of American vessels at sea. (See testimony of Almon E. Roth, *id.*, vol. 2, p. 612.)

Numerous examples were presented to the committee of the way union leaders have used closed-shop devices as a method of depriving employees of their jobs, and in some cases a means of securing a livelihood in their trade or calling, for purely capricious reasons. In one instance a union member was subpoenaed to appear in court, having witnessed an assault upon his foreman by a fellow employee. Because he told the truth upon the witness stand, the union leadership brought about his expulsion with a consequent loss of his job since his employer was subject to a closed-shop contract. (See testimony of William L. McGrath, id., vol. 4, p. 1982).

Numerous examples of equally glaring disregard for the rights of minority members of unions are contained in the exhibits received in evidence by the committee. (See testimony of Cecil B. DeMille, id., vol. 2, p. 797; see also, id., vol. 4, pp. 2063-2071). If trade-unions were purely fraternal or social organizations, such instances would not be a matter of congressional concern, but since membership in such organizations in many trades or callings is

essential to earning a living, Congress cannot ignore the existence of such power.

Under the amendments which the committee recommends, employers would still be permitted to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired if a majority of such employees have shown their intent by secret ballot to confer authority to negotiate such an agreement upon their representatives. But in order to safeguard the rights of employees after such a contract has been entered into, three additional safeguards are provided: (1) Membership in the union must be available to an employee on the same terms and conditions generally applicable to other members; (2) expulsion from a union cannot be a ground of compulsory discharge if the worker is not delinquent in paying his initiation fee or dues; (3) if a worker is denied membership or expelled from the union because he exercises the right conferred on him by the act to work for the change of a bargaining representative at an appropriate time he cannot be discharged.

It seems to us that these amendments remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promoted stability by eliminating "free riders" the right to continue such arrangements.

* * * * *

* * * It is to be observed that unions are free to adopt whatever membership provisions they desire, but that they may not rely upon action taken pursuant to those provisions in effecting the discharge of, or other job discrimination against, an employee except in the two situations described. Thus, an employee, even though he loses his union membership for reasons other than those set forth,

may not be deprived of his job because of a contract requiring membership as a condition of employment. Discrimination is permitted only if he has failed to tender dues and initiation fees or has engaged in "dual union" activity or activity designed to oust the incumbent union as exclusive representative, at an inappropriate time. • • •

SUPREME COURT, U.S.
FILED
DEC 9 1975
MICHAEL RODAK, JR., CLERK

No. 75-526

In the Supreme Court of the United States

OCTOBER TERM, 1975

LOCAL 1104, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
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Washington, D.C. 20530.

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In the Supreme Court of the United States

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NATIONAL LABOR RELATIONS BOARD, ET AL.

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 520 F.2d 411. The decision and order of the National Labor Relations Board (Pet. App. 22a-49a) are reported at 211 NLRB No. 18.

JURISDICTION

The judgment of the court of appeals enforcing the Board's order (Pet. App. 20a-21a) was entered on August 22, 1975. The petition for a writ of certiorari was filed on October 6, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the Union violated Section 8(b)(2) and Section 8(b)(1)(A) of the National Labor Relations Act by demanding the discharge of an employee for failure to pay union dues under the "agency shop" clause of the collective bargaining agreement, after having denied union membership to the same employee because he had exercised his statutory right to engage in organizational activity on behalf of another union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. 3-5.

STATEMENT

Local 1104, Communications Workers of America ("CWA") is the collective bargaining representative for certain employees of the New York Telephone Company (herein "Telco") (Pet. App. 24a-25a). Under the CWA-Telco contract which expired on July

28, 1971, membership in the Union was voluntary as the contract contained only a provision requiring those employees who were then Union members to continue to pay dues (Pet. App. 25a-26a). On July 14, 1971, Local 1104 and other CWA locals struck Telco to seek a new contract.[1] The strike ended in February of 1972, when a new agreement was reached. This agreement contained, for the first time, an "agency shop" clause, which provided (Pet. App. 26a-27a):

> 33.01 Each regular employee shall, as a condition of employment, pay or tender to the Union amounts equal to the periodic dues applicable to members for the period beginning 30 days after hire or 30 days after February 17, 1972, whichever occurs later, until the termination of this collective bargaining agreement, except that an employee may terminate this condition of employment by giving a written individual notice to the Company and the Union of such termination by certified or registered mail, return receipt requested, and postmarked between July 8, 1974 and July 17, 1974 both dates inclusive.

Wellington G. Rigby has been a Telco employee since July 6, 1948. He became a member of Local 1104 in May of 1969, and remained a member until July 7, 1971, when, as permitted by the collective bargaining agreement then in effect, he resigned from the Union. Rigby honored the Union's picket lines

---

[1] The strike was illegal because of the failure to comply with the notice provisions of Section 8(d) of the Act. See *Communication Workers of America (New York Telephone Co)*, 208 NLRB 267.

during the strike and returned to work only after the strike had ended. (Pet. App. 34a.)

In the spring of 1972, Rigby engaged in organizing activities for the Teamsters. On July 20, 1972, after he had ceased his Teamsters activities, Rigby applied for membership in Local 1104 (Pet. App. 34a). At the same time, he executed a checkoff card authorizing the Company to deduct membership dues from his wages (*ibid.*). On September 2, Rigby reiterated his membership request in a letter to the Union and tendered the dues requested by the Union by personal check (J.A. 6a-7a, 10a).[2]

On September 5, Local 1104 refused Rigby's application for membership solely on the ground that he previously had engaged in organizational activities on behalf of a rival union (Pet. App. 34a-35a). After this denial of membership, Rigby made no further tender of dues. Local 1104 demanded that Telco terminate Rigby's employment for failure to pay dues, pursuant to the agency shop clause of the agreement (Pet. App. 35a).

On these facts, the Board, adopting the findings of the Administrative Law Judge, held that Local 1104's request that Telco discharge employee Rigby because he refused to pay amounts equal to dues after the Union had denied him membership for exercising his Section 7 rights violated Section 8(b)(2) and Section 8(b)(1)(A) of the Act. The Board ordered Local 1104 to cease and desist from the foregoing un-

[2] "J.A." refers to the Joint Appendix filed in the court of appeals, a copy of which has been lodged with this Court.

lawful conduct (Pet. App. 22a-49a).[3] The court of appeals enforced the Board's order (Pet. App. 1a-19a).

ARGUMENT

The decision of the court of appeals is correct and is consistent with the decision of this Court in *National Labor Relations Board* v. *General Motors Corp.*, 373 U.S. 734. Further review is therefore not warranted.

1. "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus, §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 40. The only exception to this policy is where there is a valid union security clause in a collective bargaining agreement; in that event, an employee may be discharged for failure "to

[3] The Board also found, in the consolidated proceeding below, that Local 1101, CWA, had violated Section 8(b)(2) and Section 8(b)(1)(A) of the Act by requesting Telco to discharge 29 employees who refused to pay amounts equal to dues after the Union denied them membership for crossing the illegal picket line (see n. 1, *supra*). It also concluded that the union had violated Section 8(b)(1)(A) by denying membership to these same employees for failing to observe that illegal picket line (Pet. App. 27a-34a, 35a-37a). The court of appeals sustained these findings (Pet. App. 4a-6a, 7a-19a), and Local 1101 does not challenge them here.

tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership" (Section 8(a)(3), second proviso). However, Section 8(a)(3) and Section(b)(2) expressly prohibit job-related sanctions where an employee has been denied union membership on grounds other than his failure to tender such dues and fees. *International Union of Electrical Workers, Frigidaire Local 801* v. *National Labor Relations Board*, 307 F.2d 679, 682 (C.A.D.C.) (Burger, C.J.), certiorari denied, 371 U.S. 936. See also *In the Matter of Union Starch & Refining Co.*, 87 NLRB 779, enforced, 186 F.2d 1008 (C.A. 7), certiorari denied, 342 U.S. 815.[4]

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[4] Section 8(a)(3) expressly provides, *inter alia*:

> (a) It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership[.]

In this case, the Union denied Rigby membership for engaging in rival union activity, conduct concededly protected by Section 7 of the Act. While the Union was privileged to deny him membership for this reason,[5] the limited statutory exception for discrimination based on a union security clause did not permit the Union to attempt to secure Rigby's discharge.[6] For, by its terms, that exception does not

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[5] The exclusion from membership was permissible under the proviso to Section 8(b)(1)(A), as the Board and the courts permit a union to defend its existence by denying membership or union office to employees who file decertification petitions or organize on behalf of rival unions. *E.g., Tawas Tube Products, Inc.*, 151 NLRB 46; *Int'l Molders' and Allied Workers, Local 125 (Blackhawk Tanning Co., Inc.)*, 178 NLRB 208, enforced, 442 F. 2d 92 (C.A. 7).

[6] That Congress intended to bar, not only certain evils of compulsory unionism (Pet. 11-16), but also job-related sanctions where membership was denied for reasons other than nonpayment of dues and fees, is shown by the following colloquy between Senators Pepper and Ball (the latter a Senate manager of the bill):

> MR. PEPPER. And the union can admit to membership anyone it wishes to admit, and decline to admit anyone it does not wish to accept.
>
> MR. BALL. That is correct. But the union cannot, by declining membership for any other reason than nonpayment of dues, thereby deprive the individual concerned of the right to continue in his job. In other words, it cannot force the employer to discharge him. [93 Cong. Rec. 4272 (1947)].

Moreover, Congress contemplated that Section 8(b)(2) would prohibit a union from causing an employer to discrim-

apply where membership is denied for reasons other than the employee's failure to tender dues and fees. Accordingly, the Union's attempt to cause Rigby's discharge, not being privileged by the union security proviso to Section 8(a)(3), became the equivalent of an attempt to cause that discharge because of his protected activity, a clear violation of Section 8(b)(2) and Section 8(b)(1)(A) of the Act.[7]

2. Contrary to petitioner's contention (Pet. 18-19), the decision below is fully consistent with *National Labor Relations Board* v. *General Motors Corp.*, 373 U.S. 734. In that case, the Court held that an "agency shop" clause—that is, a provision which required all employees after 30 days to pay the union's regular initiation fee and monthly dues, but left to the employees the option whether to join the

---

inate against an employee expelled for organizing on behalf of a rival union. Thus the Conference Report stated:

> (2) A provision which was contained in the Senate amendment in section 8(b)(2), designed to prevent an employer from discriminating against an employee covered by a union shop agreement, who had been expelled from the union for activities in behalf of another representative, is omitted as unnecessary since there is nothing in the conference agreement which permits an employer to discriminate against an employee who has been expelled for this reason. [H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 44 (1947).]

[7] See *National Labor Relations Board* v. *Bell Aircraft Corp.*, 206 F. 2d 235, 238 (C.A. 2), where the union caused the employer to discriminate against the employee, not for the nonpayment of dues, but for crossing a picket line; see also Pet. App. 15a-16a.

union or not (373 U.S. at 744)—was a form of union security sanctioned by the proviso to Section 8(a)(3).[8] The Court left "for another case" "the significance of desired, but unavailable, union membership" (*id.* at 744-745, n. 12).

The court of appeals in this case considered that question and correctly concluded that where, as here, the union has denied the employee membership for exercising a right protected by Section 7, to permit it to require the employee to pay full union dues, is to deprive the employee of the membership option which *General Motors* recognized. As the court stated, such a requirement would enable the union to arrogate to itself "the employees' choice regarding union membership while nonetheless requiring them to pay dues" (Pet. App. 16a).

3. The decision below does not, as petitioner suggests (Pet. 20), deny a union the right to require each "employee represented by a union to pay his share of the cost of such representation." The record shows no difference in the amount of dues assessed full members and those sought from Rigby, and where the "service fee" charged to nonmembers is equal to the dues of full members and is allegedly allocated to collective bargaining costs, it follows that nonmembers are being required to pay more for the same services than are union members, or to sub-

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[8] The Court noted that the agency shop merely "places the option of membership in the employee while still requiring the same monetary support as does the union shop" (373 U.S. at 744).

sidize peripheral union activities. *Retail Clerks Int'l Ass'n, Local 1625* v. *Schermerhorn*, 373 U.S. 746, 753-754. Thus, this case does not present the question whether a union may require an employee to pay only "his share of the cost of union representation" (Pet. 3), after denying the employee membership because he exercised Section 7 rights.[9] Finally, contrary to petitioner's contention (Pet. 21), Rigby was not a "free rider." He had applied for union membership and tendered the requisite dues, only to be denied membership.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

FRANK C. MORRIS, JR.,
Attorney,
National Labor Relations Board.

DECEMBER 1975.

---

[9] Cf. *J. J. Hagerty, Inc.*, 153 NLRB 1375 (hiring hall fee for nonmembers equal to union dues was discriminatory because portion of dues was used to defray union expenses unrelated to job opportunities of nonmembers).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 599121 137

Supreme Court, U. S.
FILED
NOV 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-526

LOCAL 1104, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD, WELLINGTON G. RIGBY, and NEW YORK TELEPHONE COMPANY,

Respondents.

RESPONDENT NEW YORK TELEPHONE COMPANY'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-526

LOCAL 1104, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD, WELLINGTON G. RIGBY, and NEW YORK TELEPHONE COMPANY,

Respondents.

RESPONDENT NEW YORK TELEPHONE COMPANY'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

On July 21, 1975, the United States Court of Appeals for the Second Circuit unanimously denied a petition for review filed on behalf of petitioner, Local 1104, Communications Workers of America, AFL-CIO ("CWA"), and its sister local, Local 1101, and granted the National Labor Relations Board's ("Board") cross application for enforcement. The New York Telephone Company ("Telco.") was the successful charging party in the Local

1101 case before the Board. The charges against Local 1101 and petitioner Local 1104 were consolidated before the Board. A single petition for review (Second Circuit Docket No. 74-2044) and a single petition for enforcement (Docket No. 74-2230) were filed. Telco., as a successful charging party as well as the employer of respondent Wellington G. Rigby ("Rigby"), was granted permission to intervene and to participate fully in both cases before the court below.

Question Presented

The court below correctly determined that Locals 1104 and 1101 committed unfair labor practices in seeking the discharge of employees for failing to pay dues, while denying to them full union membership. The employees in both cases engaged in protected activity which the petitioner and Local 1101 found objectionable. The court below stated the applicable principle as follows:

> "Where, as here, the denial of full membership was not for the failure to pay dues, but rather for engaging in protected activity, the union's attempt to invoke the agency shop clause violates §8(b)(1)(A) and §8(b)(2)" (P.A. 15a-16a).[1]

The question presented therefore is whether a union may, under the guise of an agency shop clause, compel the discharge of employees who refused to pay dues where the union denied to them full membership for exercising protected rights under the Labor-Management-Relations Act ("Act").

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[1] Citations to the Appendix submitted by Petitioner will be noted by P.A. followed by the appropriate page numbers in parenthesis.

Statement of the Case

The court below examined the underlying intent and purpose of the Act and resolved a basic conflict in favor of employees' Section 7 rights and against a union's attempt to quash those rights under the guise of union security.

In the case which is a subject of this petition for a writ, the Board held that Local 1104 violated sections 8(b)(1)(A) and 8(b)(2) by seeking the discharge of employee, Rigby, under the Agency Shop provisions of the collective bargaining agreement for failing to pay dues while denying to him membership. He was denied membership solely because of his organizational activities on behalf of a rival union conducted while he was not a member of Local 1104 and prior to his application for memership (A54a).[2] Rigby was otherwise qualified for memership. During the '71-'72 Telco strike, he honored the CWA picket lines.

In the case involving Local 1101, which was not included in this petition, the Board similarly held that sections 8(b)(1)(A) and 8(b)(2) of the Act were violated when Local 1101 sought the dismissal of other employees of Telco for failing to pay dues, under the same Agency Shop provision of the agreement, while denying to them membership. Membership was denied because these employees exercised their rights guaranteed by the Act and crossed CWA picket lines during the '71-'72 strike while they were not members of Local 1101. In both cases, the employees involved applied for member-

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[2] This fact was stipulated to by Local 1104 and the General Counsel. Numbers in parentheses preceded by the letter A refer to pages in the Joint Appendix in the Court of Appeals which petitioner has requested that Court to certify to this Court.

ship after the strike and remained willing to pay dues and initiation fees as full members.

The CWA is the collective bargaining representative for employees in a number of separate bargaining units in the Bell System. Since 1961, it has represented Telco's plant department and certain other employees in one bargaining unit.

Petitioner Local 1104 and Local 1101 are constituent locals of the CWA, operating within designated jurisdictions of the Telco bargaining unit.

The Board has held in *Communications Workers of America, AFL-CIO (New York Tel. Co.)* 208 NLRB No. 32, 85 LRRM 1104 (1974) that the CWA strike of '71-'72 was in violation of sections 8(b)(3) and 8(d) of the Act. This, however, was not the basis of the decision of either the Board or the Court below. Both decisions were based on the fact that the employees, including Rigby, engaged in protected activities for which reasons Locals 1104 and 1101 denied them membership.

The collective bargaining agreements prior to the one agreed to in February 1972, which is the subject of this proceeding, had neither a Union Shop nor an Agency Shop provision. They contained only maintenance of membership dues clauses (A74a). Membership, which continued to grow during those years, had always been voluntary. In February 1972, for the first time in the collective bargaining relationship between Telco and the CWA, an Agency Shop provision was placed in the agreement. That clause provided in material part as follows:

> "33.01 Each regular employee shall, as a condition of employment, pay or tender to the Union amounts equal to the periodic dues applicable to members for the period beginning 30 days after hire or 30 days after February 17, 1972, whichever occurs later, until the termination of this collective bargaining agreement, except that an employee may terminate this condition of employment by giving a written individual notice to the Company and the Union of such termination by certified or registered mail, return receipt requested, and postmarked between July 8, 1974 and July 17, 1974 both dates inclusive" (A75a).

Statute Involved

Labor-Management Relations Act—Relevant Sections

Sec. 1(b):

> "Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations *each recognize under law one another's legitimate rights in their relations with each other,* and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety or interest.
>
> "It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, *to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce,* to define and proscribe practices on the part of labor

and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce" (emphasis supplied, 29 U.S.C. sec. 141(b)).

Sec. 7:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title" (29 U.S.C. sec. 157).

Sec. 8(a):

"It shall be an unfair labor practice for an employer—

• • •

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

• • •

". . . Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization . . .

• • •

"(B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . ." (29 U.S.C. §158(a)(3)).

Sec. 8(b):

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . ." (29 U.S.C. sec. 159(b)(A)).

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as to condition of acquiring or retaining membership; . . ." (29 U.S.C. sec. 158 (b)(2)).

Summary of Argument

It is respectfully submitted that the CWA's right to self-defense or self-preservation is not in issue in this case. What is at stake is the employees' ability to exercise fundamental rights guaranteed by Congress free of the coercion inherent in the threat of loss of employment. The decision of the court below in favor of these rights

would neither impair the CWA's existence nor hamper its so-called right to self-defense.

Significantly, for over eleven years the CWA maintained a viable collective bargaining relationship with Telco and increased its membership without either a Union Shop or an Agency Shop. Even the minimal hard core financial membership belabored over in this petition was not required. "Free rides" historically were permitted. No factual bases exist for the claim that the CWA's existence is threatened because of Rigby's free ride.

In determining the substantial issue raised, the court below was mindful of what Local 1104 had attempted: it was not content to merely deny membership to Rigby to protect its existence. Instead, it attempted to enlist the aid of the employer to punish a former member by the threat of loss of employment. In effect, the petitioner sought to reinstitute the evils of compulsory unionism under the guise of an Agency Shop clause—the very activity Section 8(b)(2) intended to prohibit.

The employee had an unwelcome Hobson's choice. He either gave up the right to organize for a union of his choice or lose his right to full membership in the CWA while still having to pay dues, because he is no longer protected by the Act.

As shall be demonstrated, none of the points raised by petitioner is worthy of consideration at this stage in the history of the Act and labor relations. The Court of Appeals' determination was persuasively reasoned and exhaustive. It was consistent with the clear language of the Act, legislative history and applicable judicial precedent, and the fundamental purposes of National Labor policy.

Reasons for Denying the Petition

In arriving at its decision, the court below relied in substantial part on the language of Section 8(b)(2), which makes it an unfair labor practice for a labor organization to

> ". . . cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated *on some ground other than this failure to tender the periodic dues . . .*" (emphasis added, 29 U.S.C. § 158(b)(2).)

The petitioner argued that as long as a union permitted an employee to pay dues, even though he was denied membership for engaging in an acknowledged protected activity, Section 8(b)(2) was satisfied. The court below rejected this argument on the grounds that it was neither in accord with the language of 8(b)(2) nor the underlying Congressional intent. The court stated that Congress by permitting Union Shops, wanted not only to protect unions from free riders but also to minimize the abuses of compulsory unionism. Section 8(b)(2) circumscribed the grounds on which a union could invoke union security to seek an employee's discharge. If an employee is denied membership for reasons other than the refusal to pay dues, the union may not cause the employer to discriminate against the employee.

The court below noted that the petitioner's argument would, in effect, read out of the Act the notion of a reason other than the failure to pay dues. The court stated:

> ". . . We hold, therefore, that in order to give meaning to the 'other than his failure to tender periodic

dues' clause of § 8(b)(2), we must look to the reason for denial of full membership, not the reason for denial of financial core membership.' Where, as here, the denial of full membership was not for the failure to pay dues, but rather for engaging in protected activity, the union's attempt to invoke the agency shop clause violates § 8(b)(1)(A) and § 8(b)(2), *NLRB* v. *Bell Aircraft Corp.*, 206 F.2d 235 (2d Cir. 1953)." (P.A. 15a-16a)

The court's interpretation of the intent of the section finds ample support in the history of the Act. In *Union Starch & Refining Company*, 87 NLRB 799 (1949), *enforced* 186 F.2d 1008 (7th Cir. 1951), *cert. denied* 342 U.S. 815 (1951), where the Board declared unlawful another union attempt to foster compulsory unionism by way of a union-shop clause, the right of an employee to refrain *at his option* from becoming a full member under a union-shop clause was upheld by the Board, which decision was enforced by the Seventh Circuit Court of Appeals. The employee had the option of either full membership or merely financial-core membership. The Board stated:

> "Throughout the amendment to the Act, Congress evinced a strong concern for protecting the individual employee in a right to refrain from union activity and to keep his job even in a union shop." (87 NLRB at 784.)

The Seventh Circuit deferred to the expertise of the Board in the matter of labor relations and stated that its interpretation was in harmony with the purpose of Congress to prevent utilization of union-security agreements except to compel payment of dues and initiation fees. (186 F.2d at 1012.)

That the intent of Congress was to eliminate the evils of compulsory unionism is evident from the following remarks of Senator Taft made during the debate on Section 8(a)(3):

> "I merely wish to say that of course many persons believe that the union shop, which is the usual form of closed shop, should be absolutely prohibited. The committee did not feel that it should go that far, but the committee felt that if it permitted a union shop agreement which provided that every man must be a member of the union, then the union must be reasonable, must accept as members all who apply for membership, and must accept then on the same terms as it applies to other members, and must permit them to remain in the union if they are willing to pay their dues. In other words, the position of the committee was this: Either we must have an open shop or we must have an open union. We cannot have both." *II Legislative History of the Labor Management Relations Act, 1947*, 1096 (GPO 1948).

This basic purpose was also recognized by this Court in *NLRB* v. *Allis Chalmers Mfg. Co.*, 388 U.S. 175 (1967), which upheld a union's right under Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A) to fine members who violated a legitimate union rule governing membership. This Court, however, noted the explicit wording of Section 8(b)(2) in contrast to the imprecise language of Section 8(b)(1)(A), and stated that:

> "Section 8(b)(2) limits union power to compel an employer to discharge a terminated member other than for 'failure [of the employee] to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.'" (388 U.S. at 184)

This Court stated further:

> ". . . It is significant that Congress expressly disclaimed in this connection any intention to interfere with union self-government or to regulate a union's internal affairs. The Senate Report stated:
>
> 'The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. But the committee did wish to protect the employee in his job if unreasonably expelled or denied membership. The tests provided by the amendment are based upon facts readily ascertainable and *do not require the employer to inquire into the internal affairs of the union.*' S. Rep. No. 105, 80th Cong., 1st Sess., 20, I Legislative History of the Labor Management Relations Act, 1947 (hereafter Leg. Hist.) 426. (Emphasis supplied.)

Senator Taft, in answer to protestations by Senator Pepper that § 8 (b)(2) would intervene in the union's internal affairs and 'deny it the right to protect itself against a man in the union who betrays the objectives of the union . . .,' stated:

> *'The pending measure does not propose any limitation with respect to the internal affairs of unions.* They still will be able to fire any members they wish to fire, *and they still will be able to try any of their members.* All that they will not be able to do, after the enactment of this bill, is this: If they fire a member for some reason other than nonpayment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion."[13] (Emphasis supplied.)

> Section 8 (b)(1)(A) was under consideration when Senator Taft said this. Congressional emphasis that § 8 (b)(2) insulated an employee's membership from his job, but left internal union affairs to union self-government, is therefore significant evidence against reading § 8 (b)(1)(A) as contemplating regulation of internal discipline. . . ." (388 U.S. at 185)

It is obvious from the foregoing that the central premise of national labor policy is *not* the protection of strong labor unions for purposes of collective bargaining or collecting dues, as petitioner would have this Court believe. The very thrust of the development of national labor policy has been in the direction of increasing the protection of fundamental rights of individual employees against the encroachment of both employers and overreaching unions. Thus, the *Wagner Act,* originally directed solely at employer conduct, was amended by *Taft-Hartley* in 1947, to include the protection of individual employees against unlawful union behavior. *Landrum-Griffin* was passed to further insure the protection of individual rights by requiring internal union democracy.

In *NLRB* v. *Schwartz,* 146 F.2d 773 (1945) the Fifth Circuit observed:

> "Contrary to a rather general misconception, the National Labor Relations Act was passed for the primary benefit of the employees as distinguished from the primary benefit to labor unions, and the prohibition of unfair labor practices designed by an employer to prevent the free exercise by employees of their wishes in reference to becoming members of a union was intended by Congress as a grant of rights to the *employees* rather than as a grant of power to the union." (Emphasis in original, at 774)

In the Act itself Congress declared in section 1 its purpose and policy to be in part ". . . to protect the rights of individual employees in their relations with labor organizations. . . ." (29 U.S.C. § 141(b))

The very first words in Section 7 of the Act are "Employees shall have the right to . . ." not "Unions shall have the right to". Moreover, Section 7 expressly states that employees shall have the right to form, join or assist labor organizations or "to refrain from any or all of such activities." (29 U.S.C. § 157)

It must be emphasized that the employee Rigby, who was not a member of the CWA at the time he attempted unsuccessfully to organize for a rival union, was engaged in a protected activity. The right of petitioner to reject his membership application did not make Rigby's activity unprotected. Nevertheless, the right of a union to reject the application was not questioned. What the court below questioned, however, was the petitioner's right to jeopardize the livelihood and right to a job of an employee who was not a member of the petitioner, simply because he supported a rival union—a protected activity.

The decision of the court below is supported by this Court's decision in *NLRB* v. *General Motors*, 373 U.S. 734 (1963), where it was held that the agency shop was a form of union security permitted by Congress. What was declared lawful, however, was an agency shop that gave employees the option of becoming either full members or financial core members.

It was expressly noted that this employee option served the Congressional purpose of eliminating the evils of compulsory unionism. This Court stated:

> "*The agency shop arrangement proposed here removes that choice from the union and places the option of membership in the employee while still requiring the same monetary support as does the union shop.* Such a difference between the union and agency shop may be of great importance in some contexts, but for present purposes, it is more formal than real. *To the extent that it has any significance at all it serves, rather than violates, the desire of Congress to reduce the evils of compulsory unionism while allowing financial support for the bargaining agent.*" (emphasis added, 373 U.S. at 744).

The petitioner's view of the agency shop in this case is identical to the position recommended by the employer in *General Motors, supra,* in its attempt to persuade this Court that the agency shop was unlawful. The employer there claimed that under the agency shop, the union had the right to deny membership while demanding payment of dues. This Court rejected that interpretation of the agency shop and stated that where the option is given to the employee, the evils of compulsory unionism are reduced (373 U.S. at 774). By implication, this Court recognized that petitioner's interpretation of a union's rights under an agency shop would tend to foster the evils of compulsory unionism.

If the petitioner were to prevail here, the option favored in *General Motors, supra,* would not be available to employees. Unions would be open to everyone except those employees who exercised fundamental rights guaranteed by the Act. The evil of compulsory unionism would be given free license.

Moreover, we would be confronted with an anomolous situation. Under the established principles of *Union Starch, supra,* in which case this Court denied certiorari, the employee has the option of joining or tendering dues where a union shop exists. Under an agency shop, pre-

sumably a more liberal form of union security, this *option* would not be available to the employee. This could not have been intended by this Court in *General Motors*. This is clear from this Court's decision in *Retail Clerks* v. *Schermerhorn*, 373 U.S. 746 (1963), which was decided the same day as the *General Motors* case, which stated that:

> "It follows that the *General Motors* case rules this one, for we there held that the 'agency shop' arrangement involved here—which imposes on employees the only membership obligation enforceable under § 8(a)(3) by discharge, namely, the obligation to pay initiation fees and regular dues—is the 'practical equivalent' of an 'agreement requiring membership in a labor organization as a condition of employment.'" (373 U.S. at 751.)

There is no basis in fact for petitioner's argument that union dues pay only for the role of representing the employee in collective bargaining. The dues that Rigby would be called upon to pay without any of the rights of a member are the exact equivalent of those dues union members must pay. As this Court noted in *Retail Clerks, supra,* (footnote 6), quoting from the union's brief in that case, union dues are used to promote or defeat legislation, to publish newspapers, to finance litigation, to provide scholarships and free tuition, and to do a host of other things that members authorize. (373 U.S. at 753.) On the other hand, the right to full membership in a union, the destruction of which petitioner seeks to have this court sanction, is a substantial right. It includes the right to vote for union officers who make policy, as well as to ratify or vote against union-negotiated contracts. The free ride given to Rigby is compensation for denying to him the substantial rights of union membership. To compel him to pay dues without membership-rights would sanction

a particularly abhorent form of taxation without representation not authorized by the Act.

The court below disposed of the "free rider," argument when it stated that the only free riders will be those who, like Rigby, are lawfully excluded from the union for engaging in "disloyal" but nevertheless protected activity. Although the court felt that the inroad on a union's ability to protect itself from free riders was not serious it stated that a decision to the contrary "would create far greater problems of compulsory unionism." (P.A. 19a.)

The principles reaffirmed by the court below had been previously followed by the Board in *United Steel Workers of America, Local 4186 (McGraw Edison Co.),* 181 NLRB 992 (1970), which decision was not challenged in court by the Steel Workers Union, the party affected most by decision in that case.[3]

Essentially, *McGraw Edison* held that it is unlawful coercion for a union to enforce an otherwise valid Union security clause while denying full membership rights to employees where such enforcement serves to discourage an employee from exercising a fundamental right guaranteed by the Act.

In that case, the employee had previously filed a decertification petition with the Board. The employee was forbidden by the Union for one year to attend meetings, and for an indefinite period, to hold office. The employee refused to pay dues and the Union threatened to obtain his discharge.

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[3] It should be noted that the *Steel Workers,* a major union, has been in the forefront of labor unions' efforts for the preservation of their prerogatives.

The Board was not dealing with the Union's right to discipline a member by fining or expulsion, and observed that the impairment of membership rights by itself was not necessarily unlawful. It was the insistence of payment of dues upon penalty of discharge while membership was impaired that constituted the unlawful conduct.

The Board stated:

> "We see no justification, either in the proviso to section 8(b)(1)(A) *or in considerations of a labor organization's need for self preservation, for the steps taken against Blaine. The threat to enforce the union security clause while continuing the sanctions against Blaine was hardly necessary to preserve the Union's existence* as an institution, *nor could it be viewed as a noncoercive form of internal discipline which would have no discouraging effect upon a member's decision to invoke the Board's representation procedures.*" (Emphasis added, 181 NLRB at 992).

Even where the most direct attack on a union's existence was made,—a decertification petition,—an employee's fundamental right under the Act took precedence.

The rights of the individual were again upheld by the Board in *Communications Workers of America,* 9505 (*Pacific Tel. & Tel.*) 193 NLRB 83 (1971). There, an employee, *while a member of the CWA,* had distributed membership cards and literature in the name of a rival labor organization. The Board referred to this as decertification activities, though the employee did not actually file a decertification petition. He was expelled from the CWA. After he refused to continue to pay dues, the CWA demanded his discharge under a contract clause conditioning employment on the payment of dues. The

Board, citing *McGraw Edison, supra,* held this to be a violation of sections 8(b)(1)(A) and (2) of the Act.

The employee's activity in that case was in no way different than that engaged in by Rigby except that Rigby was not a member of the CWA when he attempted to organize on behalf of the Teamsters. Indeed, the petitioner's right here to discipline him is even more tenuous because he was not a member.

If a primary function of the Board is to protect rights guaranteed by section 7 of the Act, then concededly, unless an employee has unimpeded access to the Board those rights are meaningless. It would seem to be equally appropriate to protect the employee's exercise of fundamental rights even before he attempts to gain access to the Board. This was recognized implicitly in *Pacific Tel. & Tel., supra,* when it protected the employee's right to distribute literature and cards on behalf of a rival union as a preliminary step to a decertification petition that was never filed. Unless the right is protected, *ab initio,* then the employee's unimpeded access to the Board would be ineffectual.

The decision of the court below is not in conflict with decisions of any other Circuit Court of Appeals. As the court below noted, the case of *NLRB* v. *Hershey Foods Corp.,* 513 F.2d 1083 (9th Cir. 1975) cited by petitioner, is not inconsistent. In that case, the issue was not whether an employee may be compelled to pay dues where he was denied membership, but whether or not the employee may be compelled to become a full member against his wishes. In other words, the issue is similar to the issue determined years ago in *Union Starch, supra.* The court below noted that the principle followed in *Hershey Foods* is consistent with its own decision. The court stated:

> "... [T]he rule resulting from a combination of the two cases would appear to be that, although a union, even under a union shop clause, cannot compel any greater degree of membership than financial core membership, it must nonetheless, even under an agency shop clause, grant full membership to those employees who desire it if it wants to retain its right to receive their dues." (P.A. 16a, footnote 8.)

CONCLUSION

The decision of the court below follows naturally from this Court's decision in *General Motors* and the principle established in *Union Starch, supra.* This Court denied certiorari in that case.

For all the reasons set forth above, the Petition for a Writ of Certiorari should in all respects be denied in this case also.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-526

LOCAL 1104, COMMUNICATIONS
WORKERS OF AMERICA,
AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and WELLINGTON G. RIGBY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT RIGBY IN OPPOSITION

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QUESTION PRESENTED

Can a union insist on the discharge of an employee who duly tenders dues in accordance with the terms of an agency shop union security provision, but is denied membership in the union for having engaged in protected section 7 activity and thereafter refuses to tender dues unless he is admitted to membership?

STATEMENT

Wellington G. Rigby is an individual who has been in the continuous employ of the New York Telephone Company (Telco) since July 6, 1948. During his 27 years of satisfactory service with Telco, Rigby has periodically been a member of labor organizations representing employees of Telco. For the past several years Rigby has been working at Telco's Bellmore facility, within the jurisdiction of Local 1104, Communications Workers of America, AFL-CIO (Local 1104), the exclusive bargaining representative for these employees of the company. On or about May 1969, Rigby became a member of Local 1104 and remained a member in good standing until on or about July 7, 1971, at which time he duly resigned therefrom in accordance with Article 33 of the collective bargaining agreement then in effect between the Communications Workers and Telco.[1]

[1] In this collective bargaining agreement, which is the one immediately preceding the agreement containing the agency shop clause at issue herein, there was a maintenance of union dues provision in article 33, which provided as follows:

> 33.01 Each employee who is a member of the Union:
> (a) on or about the beginning of his employment or
>
> (b) on or after May 22, 1967, the effective date of this Agreement,
>
> whichever is the latest, shall, as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the final termination of this Agreement, *except that each such employee may, within the 10-day period immediately preceding the termination date of this Agreement terminate his obligation to tender periodic Union dues to the Union*

(continued)

Rigby's resignation preceded the lengthy strike by the Communications Workers against Telco, which began shortly thereafter and continued into early 1972. Although Rigby had validly withdrawn his union membership, he did not work during the Communications Workers' strike against Telco and returned to work only after the strike had been settled. Upon his return to work following the strike, dissatisfied with the representation given the employees by the Communications Workers, Rigby solicited support for the Teamsters from among members of the bargaining unit represented by Local 1104. He was not a member of any labor organization at this time, and was not required as a condition of continued employment to be a member of any labor organization, and engaged in this activity during the Spring of 1972. After a brief period of activity on behalf of the Teamsters, Rigby ceased all such activity and sought to rejoin Local 1104 and take an active part in union affairs affecting his livelihood. On or about July 26, 1972, after Rigby had stopped organizing for the rival union, he submitted an application for membership in Local 1104. His membership application was denied solely because he had engaged in organizing for a rival of the Communications Workers (A10, A53-54, A82)* even though he was not a member of the Communications Workers or any other labor organization at the time of his solicitation of support for the Teamsters.

[1] (continued)

> *as a condition of employment by notifying both the Union and the Company of his withdrawal from membership in the Union.* (Emphasis added.)

* References to the Joint Appendix in the Second Circuit will be denoted A ____.

In the newly negotiated collective bargaining agreement between Telco and the Communications Workers, which ended the strike, there was, for the first time, an agency shop provision which replaced the previous maintenance of union dues provision.[2] Notwithstanding Local 1104's denial of union membership to Rigby, the union insisted that Rigby pay the equivalent of union dues under the agency shop provision of the contract. Rigby tendered dues on the condition that he be accepted as a member of Local 1104 and executed a payroll deduction authorization for union membership dues (A68). Refusing to accept dues from Rigby as a member, Local 1104 thereafter requested that Telco terminate his employment for failure to pay an agency fee, which in fact was equivalent to the union's dues.

The reason for Local 1104's continued refusal to give Rigby membership rights is the organizing activity which he engaged in for the Teamsters *while he was not a member, and not required to be a member,* of the Communications Workers or any other labor organization in the Spring of 1972. Rigby has at all times been, and still is, ready,

[2] Article 33 of the agreement in question provides for an agency shop as follows:

> 33.01 Each regular employee shall, as a condition of employment, pay or tender to the Union amounts equal to the periodic dues applicable to members for the period beginning 30 days after hire or 30 days after February 17, 1972, whichever occurs later, until the termination of this collective bargaining agreement, except that an employee may terminate this condition of employment by giving a written individual notice to the Company and the Union of such termination by certified or registered mail, return receipt requested, and postmarked between July 8, 1974 and July 17, 1974, both dates inclusive.

willing, and able to pay all validly required dues and initiation fees upon his acceptance as a member of Local 1104. He has likewise been willing to support Local 1104 as a member with undivided loyalty upon his acceptance as a member, as he did between 1969 and 1971. He meets all of the eligibility requirements for union membership set forth in the Communications Workers' Constitution and the by-laws of Local 1104 (A57, A63-64), and has never been charged with, tried, fined, suspended or expelled by Local 1104 for any union offenses while a member of that organization.

ARGUMENT

Although this case appears to present a significant question left unresolved by this Court in the *General Motors*[3] case, careful examination of the facts in this case, the legislative history of the National Labor Relations Act and its amendments, and the national labor policy, make it plain that the decision of the Second Circuit is correct. Indeed, the issue left unresolved in *General Motors* was advanced by the company in that case in an effort to have this Court declare the agency shop to be illegal. The Court did not have to reach the issue and upheld the validity of the agency shop. It is somewhat ironic that the union in the case at bar is trying to uphold the very issue that was originally used in an effort to defeat the legality of the agency shop. Moreover, there is no conflict of decisions on the issue presented herein and the likelihood is that a similar set of facts will not present itself again.

[3] NLRB v. General Motors, 373 U.S. 734 (1963).

I

The Decision Below is Clearly Correct

As the Second Circuit correctly noted, it was faced in this case with a problem that was not specifically considered by Congress when it enacted the Taft-Hartley amendments to the National Labor Relations Act which provided for union shops with certain safeguards (PA3a).* The obvious reason for its not being specifically considered by Congress is that no one has ever seriously entertained, in this country, the notion of taxation without representation, which is precisely what the union seeks in this case. So foreign to all American political thought is this throwback to Revolutionary days that Congress' deliberations naturally presumed no such concept, and indeed some of its reflections strongly indicate as much. The Second Circuit's "extrapolation" from the statutory language struck a proper balance between the competing interests involved, providing a well reasoned determination which the petitioner herein shows no valid reason for reviewing. In fact, it is almost inconceivable that this Court would entertain a case for taxation without representation as the nation approaches its bicentennial.

1. The Second Circuit did not misconstrue section 8(b)(2) when it held that such section prohibits Local 1104's seeking the discharge of Rigby after he tendered dues, his tender was denied unless he would waive membership rights, and thereafter refused to tender dues unless and until he is admitted to membership. Sections 8(b)(2) and 8(a)(3) speak very clearly to an employee's obligation to:

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* References to the appendix accompanying the petition herein will be denoted PA____.

> tender the periodic dues and the initiation fees uniformly required as a condition of *acquiring or retaining* membership.

Nothing could be clearer. There is no requirement that dues and initiation fees be tendered if it does not enable an employee to "acquire" or "retain" union membership. Nowhere does there appear any support whatsoever for the naked claim, at page 16 of the petition, that Congress "plainly intended to allow the imposition of such [job-related] sanctions for nonpayment of dues even where union membership has been denied."

As petitioner correctly notes, the union security amendments were aimed at curing the evils of compulsory unionism. With the closed shop, union membership was a condition precedent to a job. Before an employer could hire an employee, the employee had to be a member of the union with whom the employer had a collective bargaining agreement; even if he were a member at the time of hire, he had to maintain that membership to retain his job.

The amendments prohibited the closed shop, compulsory unionism, requirement of union membership as a condition of employment; they permitted an employer to hire anyone, but allowed the union to negotiate a provision that would require union membership after thirty days of employment. Then, to safeguard against circumvention of the prohibition of making employment contingent upon union membership by technical compliance with the amendment followed by expulsion from the union, Congress severely restricted the grounds upon which a union could seek the discharge of an employee who was not a union member. While permitting the

unions to require union membership as a condition of continued employment beyond thirty days, it was very careful to provide that if the union expelled a member it could not be the ground for automatic discharge, as it would have been under a closed shop, unless the reason for explusion was the employee's failure to meet the union's valid initiation fee and dues requirements. The references, therefore, to delinquencies in dues and initiation payments in the italicized portions of the quotes on page 14 of the petition indicate the requirements of an employee *while a union member.*

There is no discussion whatsoever about any requirements to pay dues or initiation fees after the union relationship has been severed, for whatever reason. The key is the expulsion triggered by dues delinquencies; it is the failure to pay an initiation fee or dues which gives the unions a right to deny or revoke membership and then insist that such an employee be discharged because he has not maintained his union membership in accordance with a valid union security provision in a collective bargaining agreement. This is patently clear from a portion of Senate Report No. 105 conspicuously omitted from Appendix D of the petition. As the report described section 8(b)(2):

> The labor organization may not persuade or attempt to persuade the employer to discriminate against an employee except for two reasons: First, that the employee has *lost* his union membership by failing to tender the dues or initiation fees uniformly required as a condition of membership; second, that the employee, at a time when the Board would not entertain

> a petition to determine representation pursuant to section 9(c)(1)(A), has engaged in activity on behalf of another labor organization or in activity having as its objective the termination of the exclusive representative status of the union.[4]

Eventually, Congress rejected the "second" reason, which was an attempt to restrict an individual's section 7 rights. Significantly, nowhere is there any indication, any hint whatsoever, that a union can seek the discharge of an employee who refused to pay an initiation fee or dues after being denied membership. Again, the reference to delinquencies is always in the context of denial or revocation of membership which justifies seeking the discharge of an employee. As Senator Taft stated:

> The pending measure does not propose any limitation with respect to the internal affairs of unions. They still will be able to fire any members they wish to fire, and they still will be able to try any of their members. All that they will not be able to do, after the enactment of this bill, is this: If they fire a member for some reason other than nonpayment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion.[5]

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[4] S. Rep. No. 105, on S. 1126, 80th Cong., 1st Sess., p. 21, 1 Legislative History of the Labor-Management Relations Act of 1947, p. 427, (emphasis added).

[5] *Id.* at 1097.

With respect to desired but unavailable membership, earlier comments of Senator Taft indicate that the dues delinquencies ground for seeking discharge was only for those employees for whom union membership was available and that there was no contemplation of dues payments from those to whom membership was denied:

> But the only effect of this provision is that there may be a union shop, but if the employees do have a union shop, they cannot compel the employer to fire a man because the union will not admit him.
>
> Let us take the case of unions which prohibit the admission of Negroes to membership, they may continue to do so; but representatives of the union cannot go to the employer and say "You have got to fire this man because he is not a member of our union."
>
> So, also, if a union fires a man for some reason other than nonpayment of dues: If the employee is willing to pay his dues to the union, then the union cannot compel the employer to fire him because he is no longer a member of the union, through some action of the union in expelling him. That seems to be only common sense and common justice.
>
> There seems to be some argument for abolishing the union shop. Personally, I do not think we ought to go that far, because it is an established custom and practice in many industries and has been for many years. But I do think where it is permitted, the unions

> should be required to let all employees join the union and continue to be members of the union as long as they continue to pay their union dues.[6]

There is a clear distinction between the situation where membership is not available and where it is available. It is equally clear that the concern over dues payments applies to employees for whom membership is available. The quoted material, at pages 15 and 16 of the petition, concerning *expulsion* from membership must likewise obviously be viewed in this context.

It is important to remember that Rigby was denied membership notwithstanding his tender of dues. To this very day, he still meets, as he always has, all eligibility requirements set forth in the Local 1104 by-laws and the Communications Workers' constitution. He always has been and still is willing to pay dues and required initiation fees upon his admission to membership. Rigby clearly is not a free rider, one trying to avoid dues payments while reaping the benefits of union membership; he is an outspoken critic who is willing to pay the freight, but is being denied a voice in union affairs while being asked to pay for the union he wants but cannot join.

There can be no doubt that the Second Circuit's construction of 8(b)(2) as limiting a union's right to seek the discharge of an employee to situations where membership is available and required and the employee refuses to tender dues is correct.

2. The Second Circuit's holding that Local 1104 violated section 8(b)(1)(A) by seeking to compel Rigby to

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[6] *Id.* at 1096.

pay dues while simultaneously denying him membership for engaging in protected activity is also clearly correct.

Although it is not before this Court, the General Counsel's refusal to issue a complaint on Rigby's behalf against Local 1104 under 8(b)(1)(A) for its refusal to admit him to membership was wrong. Indeed, it was clearly inconsistent with the companion case before the Second Circuit wherein the General Counsel issued a complaint on behalf of a number of Telco's employees who were denied membership because they refrained from striking and crossed picket lines at a time when they were not members of Local 1101 in that case. Rigby, who had duly resigned from Local 1104 before the strike, began to organize for a rival union at the conclusion of the strike. At this time, he was clearly not a member of Local 1104; he was clearly not required to be a member of Local 1104; and he stopped engaging in these activities prior to making application for membership in Local 1104. He was clearly not engaged in dual union activities; he had given his support to one union at a time and never to both unions at the same time. The error of the General Counsel should not be compounded by ignoring the facts upon which his decision was based, even though that decision is not before this Court for review.

It is very clear, contrary to the assertion at page 17 of the petition, that there is no "well settled law that organizational activities on behalf of a rival union are not protected against union disciplinary action such as expulsion or exclusion." While expulsion may be permissible in such circumstances, expulsion followed by an attempt to compel dues payments is another question — and not the one that is being put before the Court on this petition.

There is not one case anywhere which holds, or even suggests, as the petition nakedly claims, that a union may exclude from membership an individual who has previously supported another union. Only the General Counsel's refusal to issue a complaint against Local 1104 for its failure to admit Rigby to membership for engaging in protected section 7 activity suggests such a right, which, it is submitted, is wrong and even inconsistent with other determinations of the General Counsel, as noted *supra*. Rigby was never disloyal to Local 1104 because all of the activity about which the union complains occurred at a time when he was not a member and had no loyalty to Local 1104. Requiring him to pay dues under such circumstances is clearly coercive, as the Second Circuit found, discouraging, as it does, protected activity.

The suggestion, at page 18 of the petition, that "disgruntled employees may be *encouraged* to avoid having to pay dues by committing acts which make it intolerable for their unions to *continue them as members*" (second emphasis added) is unfounded speculation. To begin with, Rigby was not a Local 1104 member when he engaged in protected section 7 activity, and it is this *nonmember* activity which the union is wrongfully and coercively trying to reach. Insofar as the union's concern over truly disloyal activity of its members and continuation of such membership, it has ample protection in the disciplinary proceedings and penalties provided for in its constitution. What it is seeking to reach here, and what the Second Circuit correctly found violative of 8(b)(1)(A), is the actions of nonmembers. It is attempting to secure the right to punish nonmembers for engaging in protected activity by denying them union membership

while forcing them to pay union dues which they have no obligation to pay as nonmembers.

3. The Second Circuit correctly applied the Court's decision in *General Motors* to the situation in the case at bar. It correctly noted this Court's observation in approving the agency shop that such a provision places the option of membership in the employee and is therefore a lesser form of union security than the union shop approved in the Taft-Hartley amendments and is, therefore, *a fortiori* permissible. Throughout these proceedings, the union has pressed the position which was pressed in the *General Motors* case by the company in an effort to defeat the agency shop, and which this Court avoided, as noted at 373 U.S. 744 n. 12, in upholding the agency shop. Although the question of desired but unavailable membership was not specifically addressed by this Court, the Second Circuit correctly addressed the issue and reached a result consistent not only with *General Motors*, but also with this Court's earlier decision in *Radio Officers.*[7]

Local 1104 attempts to accomplish its onerous result by perverting the concept of "financial core" membership. Originally, "financial core" membership was the accomodation struck to balance an employee's first amendment rights against the unions' "membership" entitlements under a valid union security provision. The intent of Congress in approving union shops was satisfied so long as the unions' complaints about "free riders" were satisfied. Therefore, even though membership might be available to an employee, all he need do to comply with a union

[7] Radio Officers Union v. NLRB, 347 U.S. 17 (1954).

security provision is pay dues. Local 1104 seeks to convert this accommodation to individual rights to a device which enables it to offer the accommodation left to the employee's option.

In other words, Congress, which was even considering outlawing the union shop, eventually relented to organized labor's concerns about free riders and authorized certain union security provisions that would enable it to require union membership and financial support. The employee's first amendment rights were protected by construing this membership obligation as limited to tender of dues required of members.[8] Now, the union contends that it is only obligated to offer "financial core" membership as the *quid pro quo* for dues. As the Second Circuit very cogently observed:

> The argument urged on us by the locals in this case would in effect read the notion of a reason other than the failure to pay dues out of the Act, and thereby eliminate the Congress' carefully placed wedge against compulsory unionism. For by definition, under the locals' scheme, there can be no reason for the denial of financial core membership except the failure to pay dues, since financial core membership means nothing more nor less than the fact that an employee pays his dues. We hold, therefore, that in order to give meaning to the 'other than his failure to tender periodic dues' clause of §8(b)(2), we must look to the

[8] *General Motors* and *Radio Officers, supra. See* NLRB v. Hershey Foods Corp., 513 F.2d 1083 (9th Cir. 1975).

> reason for denial of full membership, not the reason for denial of financial core membership.[9]

As the Second Circuit aptly noted, Local 1104's position "instead of accommodating the agency shop to the Act [as had been the case in *General Motors*], it twists the Act to accommodate this version of the agency shop."[10]

4. The Second Circuit correctly noted that under the union's position the reasons for denial of full membership become irrelevant, leading to the incongruous result that the agency shop would be a stronger form of union security than the heretofore much preferred union shop provision. Although Local 1104 states at page 20 of the petition that this is not the case, careful examination of its position reveals that in practical effect it is.

The "concession" that Local 1104 is prepared to make — *i.e.*, that a demand for dues following a denial of membership which itself constitutes an unfair labor practice would violate 8(b)(2) — is illusory. If the denial of membership itself constitutes an unfair labor practice, then the union must admit the individual as a member, and the individual will then have an obligation to pay dues. Unless and until true or full membership is available, there can be no obligation to pay dues or initiation fees.

5. The Second Circuit correctly observed that its decision avoided the problems of compulsory unionism which Congress attempted to cure. The union shop authorized by the Taft-Hartley amendments was an accommodation:

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[9] PA 15a (footnote omitted).

[10] *Id.*

The evils of compulsory unionism were eliminated, but protection was afforded unions against free riders. To insure that some of the compulsory unionism evils did not creep back into practice, Congress restricted employers and unions from taking any job-related action against an employee who was a union member but lost that membership for any reason other than failure to tender dues. The legislative history is unequivocally clear that this single ground alone — failure to tender dues "as a condition of acquiring or retaining membership" — could provide the basis for seeking the discharge of an employee. Rigby tendered his dues, but they were rejected. He was denied membership not for failure to pay dues, but because he had engaged in protected section 7 activity on behalf of another labor organization at a time when he was not a member of any union and was not required to be a member of any union. The union, therefore, no matter how much camouflage it uses, is seeking the discharge of Rigby for his having engaged in protected section 7 activity. The denial of membership to accomplish this goal is clearly a throwback to the closed-shop days.

Once again, the Second Circuit's decision is very well reasoned and comports with the previous guidance of this Court in related cases. It is clearly correct and should not be reviewed by this Court.

II

There is No Conflict of Decision

The issue in this case is one of first impression. It is ironic that the union advances the position last put before this Court in an effort to defeat the legality of the agency

shop. It is submitted that if the Court had entertained the issue in the *General Motors* case it would have found it to be fatal to the union's contention in that case. The Second Circuit's opinion is cogently reasoned and in line with this Court's prior decisions. The issue has never been decided in any other circuit, and, inasmuch as the Second Circuit's decision is clearly correct, it should be left unreviewed.

CONCLUSION

The union's efforts in this case are nothing less than an attempt to impose taxation without representation, an issue decided some 200 years ago by our founding fathers. It is almost unthinkable that the spokesman for the working man, organized labor, petitions this Court to sanction such activity on the eve of our nation's bicentennial.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

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Respectfully submitted,

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